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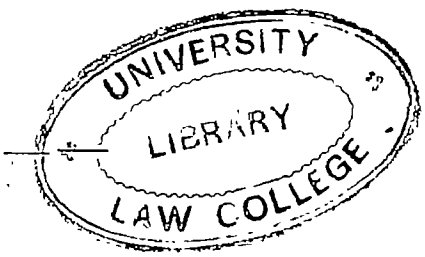

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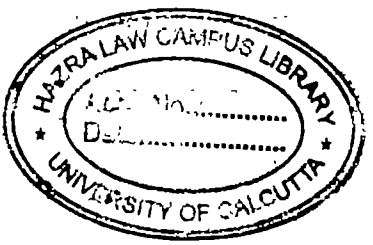
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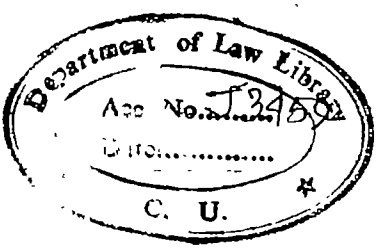
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1956

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The Calcutta Law Journal

VOL. 97 } CALCUTTA } 1

APPELLATE CIVIL.

Before Mr. Justice S. C. Lahiri.

RAMESH CHANDRA DUTTA
V.
THE SWARAYA PROPERTIES LTD.*

Civil
1955
December, 7

West Bengal Premises Rent Control Act, Sec. 12(1) (i) and proviso to Sec. 14(3)—What should be stated in a plaint in a suit for ejectment on the ground of tenant's default in payment of rent—Transfer of Property Act, Sec. 106—When is tenant entitled to six months' notice.

In a suit for ejectment the first point raised on behalf of the defendant appellant is that, upon the allegations made by the plaintiff in the plaint as it stands after an amendment at plaintiff's instance, the plaintiff has no cause of action and his suit is liable to be dismissed on that ground alone After the amendment the allegation in the plaint is that the defendant is a habitual defaulter in payment of rent and has not paid rent since August, 1952. The plaint was filed in Court on 4-12-52. The rent for November, 1952, did not become due on the date on which the plaint was filed. Taking the allegation at its face value, the allegation amounts to this that the defendant was a defaulter for the period of only three months from August, 1952, up to October, 1952, which would certainly not entitle the plaintiff to get a decree in a suit for ejectment under the proviso to Section 14(3) read with Section 12(1) (i) of the West Bengal Premises Rent Control Act, 1950. To get rid of this position, it was argued on behalf of the respondent that the true meaning of the first portion of the allegation in the amended plaint is that the defendant was a habitual

* Appeal from Appellate Decree No. 525 of 1955 against the decree of Sri B. M. Roy Choudhury, Chief Judge and Sri S. C. Biswas, Judge 3rd Bench of Court of Small Causes, Calcutta in Appeal No. 737 of 1954 dated the 11th of February, 1955 affirming the decree of Sri S. R. Ghosh, Judge, 5th Court, Court of Small Causes, Calcutta, dated the 31st of August, 1954.

Civil

1955

Ramesh Chandra Dutta
v.
The Suraya Properties Ltd.

S. C. Lahiri, J.

defaulter in payment of rent before August, 1952, by which it is meant that, although he paid rent for that period, the payments were made beyond the time limited by law, whereas the second portion of the allegation means that he totally stopped payment of rent since August, 1952. This argument, however, was not accepted. It was held that the plain meaning of the allegation was that the defendant was a defaulter since August, 1952, and that, therefore, on 4-12-1952 on which date the plaint was filed the defendant did not make default in payment of rent on three occasions within the period of 18 months as contemplated by the proviso to Sub-section (3) of Section 14 of the Rent Control Act of 1950.

It was further argued on behalf of the respondent that it is not necessary for the plaintiff to specify the period or periods for which the default has been made by the defendant in payment of rent and that it is enough for the plaintiff to allege that the defendant was a defaulter in payment of rent referred to in Clause (i) of Sub-section (1) of Section 12 on three occasions within a period of 18 months. This argument also was not accepted. It was *held* that it is not necessary for the plaintiff to recite the law which gives him the right. That all that the plaintiff is required to do under the provisions of the Civil Procedure Code is to plead facts which would entitle him to get a decree and that it is not necessary for the plaintiff to recite the law. The period or periods for which the tenant has made default is a matter which is within the special knowledge of the plaintiff and the plaintiff can certainly plead those facts in his plaint and, if he fails to do that, he cannot get a decree for ejectment by making vague allegations in the plaint and then fishing out for evidence when the suit is brought to trial.

In order to attract the operation of the first part of Section 106 it must be proved by the tenant that his tenancy was exclusively for manufacturing or agricultural purposes. If the tenancy was for multiple purposes, it comes within the expression "any other purpose" occurring in the second part of Section 106.

Appeal by the tenant Defendant against a decree in a suit for ejectment on the ground of default in payment of rent.

The material facts will appear from the judgment.

Amiya Lal Chatterjee (Sr.) for the Appellant.

P. K. Sen Gupta and *Soumendra Nath Mukherjee* for the Respondent.

The judgment of the Court was as follows:—

Civil

1955

Ramesh Chandra Dutta v. The Suraya Properties Ltd.

December, 7.

S. C. Lahiri, J.:—This is an appeal by the defendant against a decree for ejectment passed by the Special Bench of the Presidency Small Causes, Calcutta, affirming the decree made by the Fifth Bench of the Court of Small Causes, Calcutta.

The plaintiff came to court with a case that he was entitled to a decree for ejectment against the defendant and the defendant was not entitled to protection of the West Bengal Premises Rent Control Act, because he "was a habitual defaulter in the payment of rent from February, 1952 and has not paid rent since August, 1952." The defendant also failed to pay two months rent legally payably by the defendant to the plaintiff on three occasions within a period of 18 months. This statement made in the original plaint was amended by an order dated 2nd May, 1953 and after the amendment the allegation in paragraph 5 of the plaint stands as follows:

"The defendant is a habitual defaulter in payment of rent and has not paid rent since August, 1952." The second sentence in this paragraph is the same as in the original plaint. After the amendment was allowed the defendant filed an additional written statement in which he asserted that the plaintiff should not be allowed to adduce any evidence beyond the plaint. At the trial, however the plaintiff adduced evidence to prove that the defendant was a defaulter from the month of August, 1951 upto the month of September, 1952 and the trial court came to the conclusion that the defendant was a defaulter from the month of August, 1951 till September, 1952 and passed a decree for ejectment against the defendant. In coming to this conclusion the trial court relied upon a certain letter of tenancy (Ext. 4) in which the defendant is said to have agreed to pay the rent of each month on or before the 10th day of the following month. Being dissatisfied with the decree made by the trial Court, the defendant filed an appeal which was heard by the Special Bench. This Special Bench came to the conclusion that the letter of tenancy relied upon by the plaintiff was not admissible in evidence for absence of registration and proceeded to consider the question whether the defendant was entitled to relief by relying upon the provisions of the West

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Bengal Premises Rent Control Act, 1950. According to the finding's arrived at by the Special Bench, the defendant was a defaulter for the months of February, March, June, July August and September, 1952. Though the conclusion arrived at by the Special Bench as to the period of default was different from that arrived at by the Court of first instance, the Special Bench affirmed the decision of the first Court because the period of default fell within the mischief of the proviso to Section 14(3) read with Section 12(1) (i) of the West Bengal Premises Rent Control Act. Against that decision of the Special Bench the tenant defendant has brought this Second Appeal.

Mr. Chatterjee appearing in support of the appeal has raised three points before me. The *first* point raised by him is that upon the allegations made by the plaintiff in the plaint as it now stands, the plaintiff has no cause of action and the suit is liable to be dismissed on that ground alone. To appreciate this point I must refer once more to paragraph 5 of the plaint. In that paragraph as it originally stood the allegation was that the defendant was a habitual defaulter in payment of rent from February, 1952 and has not paid rent since August, 1952. After the amendment the allegation is that the defendant is a habitual defaulter in payment of rent and has not paid rent since August, 1952. The plaint was filed in Court on the 4th December, 1952. Taking the allegation at its face value it appears that the defendant was a defaulter from August, 1952 upto October, 1952 because the rent for November had not become due on the date on which the plaint was filed. The allegation, therefore, amounts to this that the defendant was a defaulter for the period of only three months which would certainly not entitle the plaintiff to get a decree in a suit for ejectment under the proviso to section 14(3) read with Section 12(1) (i) of the West Bengal Premises Rent Control Act, 1950. To get rid of this position Mr. Sen Gupta appearing for the respondents strenuously argued before me that the true meaning of the first sentence occuring in paragraph 5 of the plaint is that the defendant was a habitual defaulter in payment of rent before August, 1952 by which it is meant that although he paid rent for that period, the payments were made beyond the time allowed by law,

whereas the second half of that sentence where it is stated that the defendant has totally stopped payment of rent. Upon the findings arrived at by the courts below I am constrained to hold that this is a distinction without any difference because the court below has found that the defendant paid rent even for the months of August and September, 1952 though the payments were made after the period allowed by the West Bengal Premises Rent Control Act. I cannot, therefore, accept the argument of Mr. Sen Gupta that the two parts of the sentence in paragraph 5 refer to two different state of facts. In my opinion, the plain meaning of that sentence is that the defendant is a defaulter since August, 1952. If that be so, on the 4th December, 1952 on which date the plaint was filed, the defendent did not make default in payment of rent referred to in clause (i) of the proviso to Sub-section (1) of Section 12 on three occasions within the period of 18 months as contemplated by the proviso to Sub-section (3) of Section 14 of the West Bengal Premises Rent Control Act. Mr. Sen Gupta further argued that it is not necessary for the plaintiff to specify the period or periods for which the default has been made by the defendant in payment of rent and that it was enough for the plaintiff to allege that he was a defaulter in payment of rent referred to in clause (i) of subsection (1) of section 12 on three occasions within a period of 18 months. I am afraid I cannot also accept this argument. In my opinion, it is not necessary for the plaintiff to recite the law which gives him the right. All that the plaintiff is required to do under the provisions of the Civil Procedure Code is to plead facts which would entitle him to get a decree and it is not necessary for him to recite the law. Otherwise the plaintiff could get a decree in a case like this if he only reproduced the language of the proviso to Sub-section (3) of Section 14 of the West Bengal Premises Rent Control Act. The period or periods for which the tenant defendant has made default is a matter which is within the special knowledge of the plaintiff and the plaintiff can certainly plead those facts in his plaint and if he fails to do that, it seems to me that he cannot get a decree for ejectment by making vague allegations in the plaint and then fishing out for evidence when the suit is brought to trial. On the *first* point raised by the appellant I agree that the plaint as it

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stands after the amendment completely destroys the foundation of the plaintiff's case and the plaintiff should not have been allowed to adduce any evidence of any default made by the tenant defendant for a period prior to August, 1952. It is not for me to say whether the plaintiff could have got a decree on the plaint as it stood before amendment, but it seems to me that after the amendment the plaint discloses no cause of action whatsoever and the appellant is entitled to succeed on this ground alone.

The *second* point raised by Mr. Chatterjee relates to the period for which the tenant defendant has been found to be a defaulter by the court of appeal below. I have already stated that the court of appeal below held that the tenant defendant was a defaulter for the months of February, March, June, July, August and September, 1952. Mr. Chatterjee admits that the findings of the Courts of appeal below with regards to the months of February, March, August and September, 1952 are correct, but he challenges the finding with regard to the month of July. According to him the rent for the month of July was deposited in the office of the Rent Controller on the 16th August, 1952 because 15th August, 1952 was a public holiday. Mr. Sen Gupta appearing for the respondent, on the other hand, contended that the rent for the month of July, 1952 was deposited on the 20th September, 1952. On this point the trial court came to the finding that the rent for July 1952 was paid by a cheque dated 20th September, 1952. Ext. 1(j) is that cheque and the corresponding counterfoil is Ext. B(4). In the counterfoil filed [Ext. B(4)] the month to which it related was mentioned as July 1952, but subsequently it was altered into August, 1952. The trial court came to the conclusion that this was an interpolation at the instance of the tenant defendant and he held that the counterfoil related to rent for July, 1952. The appellate court, however, does not come to any specific finding on this controversial point but records some general findings to the effect that from the oral and documentary evidence adduced by the plaintiff it was quite clear that the defendant did not pay rents for February, March, June, July, August, and September, 1952 in time. The lower appellate court then proceeds to

hold that even upon the defence case that the rent was deposited on the 16th August, 1952, the defendant must be held to be a defaulter because it was not paid on the 15th August, and the appellate court further holds that the fact that the 15th August, 1952 was a Sunday did not entitle the defendant to pay the rent on the following day. It is not necessary for me to record my views on the question as to whether the payment which was due to be made on the 15th August, 1952 but was actually made on the 16th on account of the 15th August being a public holiday is a valid payment. Mr. Chatterjee has invited my attention to Section 12 of the Bengal General Clauses Act, 1899 which provides that if anything is required to be done in any court or in any office on date which is a public holiday, it can be done on the next following day. I am not however recording my final decision on this point because it is not necessary for me to decide this question. If the appellant had confined his argument to the second point only I would have been constrained to send the appeal back to the lower appellate court for rehearing, but in view of my decision on the first point raised by the appellant I have reached the conclusion that that is neither just nor desirable.

The *third* point raised by Mr. Chatterjee is that the tenancy of the defendant was partly for manufacturing and partly for residential purposes and as such he was entitled to six months' notice under the first half of Section 106 of the Transfer of property Act and since the plaintiff had given only 15 days' notice, the notice served by the plaintiff was not sufficient in law to determine the tenancy. This point was raised in the courts below and both the courts have held that in order to attract the operation of the first part of Section 106 of the Transfer of Property Act it must be proved that the tenancy was exclusively for manufacturing or agricultural purposes. If the tenancy was for a multiple purpose it comes within the expression "and other purpose" occurring in the second half of Section 106. In support of this proposition the court of appeal below relied upon the decision of this Court in the case of *Sati Prasana Mukherjee* and *others* v. *Md. Fazal* (1) and Mr. Sen Gupta has relied upon another decision of this Court in the case of *L. A. Saunders* alias *Sonders* v. *Land Corporation of Bengal Ltd.* (2). Upon a consideration of the

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principles laid down in those cases and also upon a plain construction of Section 106 of the Transfer of Property Act, it seems to me that the view taken by the Court of appeal below on this point is right and unless the tenant proves that his tenancy is exclusively for agricultural or manufacturing purpose he is not entitled to the benefit of six months' notice as contemplated by the first half of Section 106 of the Transfer of Property Act.

In the result although I cannot agree with the third point raised by Mr. Chatterjee and I accept the second point only in part, my decision on the first point is sufficient to allow this appeal and to dismiss the plaintiff's suit for ejectment.

I, accordingly, order that this appeal should be allowed and the plaintiffs' suit dismissed.

There will be no order for costs in this appeal.

Leave under clause 15 of the Letters Patent is asked for and it is refused.

P. K. D. *Appeal allowed.*

(1) (1950) 86 C.L.J. 12.
(2) (1954) 98 C.L.J. 354

ORIGINAL CIVIL

Before Mr. Justice P. B. Mukharji

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Government of India Act, 1935, Sec. 175 (3), requirements of —India Constitution, Art 299, intention of.

Indian Contract Act, Secs. 65, 70 & 72—Scope of—If applicable in the present case.

In the present case, the contract is supposed to be contained in the invitation for tenders, the offer for such tenders and their acceptance All that is by correspondence through different officers of the defendant and the plaintiff. None of such correspondence answers the requirements of section 175 (3) of the Government of India Act, 1935. No agreement was in fact signed :

Held there was no contract which answered the statutory requirements of Sec. 175 (3) of the Government of India Act, 1935 and hence there was no enforceable contract or agreement as against the Union of India because of this defect in form.

Sec. 70 of the Indian Contract Act cannot be applied when the act done or thing delivered was not lawful.

Nagendra Nath Ray v. *Jugal Krishore Roy* (1) followed.

The intention of Sec. 175 (3) of the Government of India Act is that the administraton is a vast organisation and in order to make the administration and public exchequer liable, ordinary prudence requires that any and every proposal and acceptance by any one acting on behalf of the vast administration should not be burden on the public revenue unless the contract is in prescribed form.

A party should not be allowed to take protection unless he pleads it.

* Original Sine Suit No. 2391 of 1948.

(1) (1925) 29 C.W.N. 1052.

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A person who disregards an express and obvious statutory mandate such as contained in Sec. 175 (3) of the Government of India Act, 1935 or its present counterpart the constitutional provision of Art 299 of the Constitution whose effect is to render the agreement unenforceable against the Government cannot attract the doctrine that the "agreement is discovered to be void" within the meaning of Sec. 65 of the Contract Act

The expression "discovered to be void" is not a cloak or excuse for ignorance of law at the time of the contract.

It cannot be the intention of Section 72 of the Indian Contract Act that wherever and whenever and however a mistake of law occurs, a claim may be made under Sec. 72 of the Indian Contract Act.

The present case is not a case of mistake of law. It is ignorance at best and disregard at the worst.

Suit for recovery of Rs. 12,161/- against the Union of India.

The material facts will appear from the judgment

T. P. Das for the Plaintiff.

S. C. Ganguli and S. Mitter for the Defendant.

The judgment of the Court was as follows.

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P. B. Mukharji, J. :—This is plaintiff's action against the Union of India for the recovery of two sums of money, one for Rs. 12,161/- and the other for damages amounting to Rs. 49,186/8. As the suit was instituted in 1948 the original defendant named was the Dominion of India. The plaintiff has given up his claim for damages for Rs. 49,186/8 and that is recorded. The suit, therefore, is now only for the recovery of Rs 12,161/-. That is the only issue.

The plaintiff claims this sum of Rs. 12,161/- on the ground that it paid this sum to the Government as the purchase price of certain bricks from the Government. The plaintiff alleges

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that the Government failed to deliver the bricks The plaintiff, therefore, claims refund of the sum of Rs. 12,161/-.

The facts of the case are short and simple. The plaintiff pleads that towards the end of June or the beginning of July, 1946 the Governor-General in Council for undivided India invited tenders for the purchase of surplus bricks and brick-bats in the Agartolla area in the State of Tipperah. The plaintiff tendered for such purchase. His tender was accepted. On the 12th July, 1946 he deposited the entire purchase price of Rs 12,161/- at the Tipperah Treasury by Challan No. 15. The plaintiff pleads that the Governor-General in Council failed and neglected to deliver to the plaintiff any of the said bricks or any portion thereof and, therefore, he is entitled to a refund of this sum of Rs. 12,161/-.

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On behalf of the Union of India the defence taken is three-fold. The *first* defence is that the contract not being in the form under section 175 (3) of the Government of India Act, 1935, it was not enforceable against the Union. The *second* defence is that the Union of India is not liable to refund this amount under the Rights, Property and Liabilities Order, 1947. The *third* defence is that this Court has no jurisdiction to entertain and determine this suit.

Neither the plaintiff nor the defendant has called any oral evidence. There is an admitted brief of documents and correspondence marked Exhibit A in these proceedings.

I shall take up the first defence on the form of contract under section 175 (3) of the Government of India Act, 1935 now represented by Article 299 of the Constitution Now in this case the contract is supposed to be contained in the invitation for tenders, the offer for such tenders and their acceptance. All that is by correspondence through different officers of the defendant and the plaintiff. But none of such correspondence answers the requirements of section 175 (3) of the Government of India Act. Under Clause 7 of

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the invitation for tenders it was provided "the purchasers will be required to sign an agreement" (D.D. No. 1). No agreement was in fact signed. It, therefore, must be held, and I hold accordingly, that there was no contract which answered the statutory requirements of section 175 (3) of the Government of India Act.

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The more important question that now remains to be answered is that even if there is no enforceable contract or agreement as against the Union of India because of this defect in form, can there be any claim for refund for money paid in pursuance thereof on the ground of failure of consideration as pleaded in paragraph 5 of the plaint. In order to be able to claim refund, Mr T. P. Das learned counsel for the plaintiff put forward three arguments. His *first* argument is that the plaintiff is entitled to claim refund under section 70 of the Indian Contract Act. His *second* argument is that the plaintiff is entitled to claim refund under section 65 of the Indian Contract Act. His *third* argument is that he is entitled to claim refund under section 72 of the Indian Contract Act. These arguments require careful consideration.

As section 70 of the Indian Contract Act was put forward first as a ground for claiming refund, I shall deal with it first. Section 70 of the Contract Act says that where a person "lawfully" does anything for another person or delivers anything to him not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to give compensation to the former in respect of or to restore the thing so done or delivered. Now as I read this section, it cannot in my view be applied when the act done or thing delivered was not lawful. The clear language of S.70 of the Contract Act is authority enough for that conclusion but if any more authority is needed it is provided by the decision of an Appellate Bench of this Court in *Nagendra Nath Roy* v *Jugal Kishore Roy* (1) and of the Bombay High Court in appeal in *Punjabhai* v *Bhagwandas* (2) The first requisite is that

[1] [1925] 29 C. W. N. 1052.
[2] [1928] I L. R. 53 Bom. 309.

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the person doing an act or delivering a thing under section 70 of the Contract Act has initially to do it 'lawfully'. It cannot in my judgment be said that a person 'lawfully' pays money to the Government when contract with the Government in order to be enforceable is required by Statute to be in a particular form but the person disregards that form. The intention of section 175(3) of the Government of India Act is clear however harsh it may appear in individual instances. That intention is that the administration is a vast organisation, and in order to make the administration and public exchequer liable, ordinary prudence requires that any and every proposal and acceptance by any one acting on behalf of the vast administration should not be a burden on the public revenue unless the contract is in prescribed form. It is a needed protection. Without observing such protection if a person delivers money to the Government and tries to make the Government liable either on the basis of a contract or on the basis of money had and received or on the basis of quasi contract, then much of this statutory security of public exchequer, which this statutory provision was intended to protect, would be gone. In that context I do think that payment of Rs. 12,161/ without insisting on the contract in the specified form should not have been made and, therefore, such payment of money was not "lawfully" made within the meaning of section 70 of the Contract Act Specially this is so when the invitation for tender by a specific clause drew attention to the fact that the purchaser would be required to sign an agreement. The plaintiff, therefore, before he paid the money should have insisted on that agreement as prescribed by statute and also by the express terms of the tender. In depositing the money without such requisite agreement, and in disregard of the express terms of the tender, he took the risk and imperilled his position.

Then the second difficulty on the way of plaintiff is the decision of the Court of Appeal in the *Union of India* v. *Ram Nagina Singh* (1). The observations there contained appear to

(1) (1951) 89 C. L J. 342.

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suggest though not conclusively that section 70 of the Contract Act does not apply to the context of facts that are present here. In fact, the court of Appeal there reversed the decision of the trial Court under section 70 of the Indian Contract Act which held that section 70 applied. It is unnecessary for me to go into further details of *Ram Nagina's case*(1)having regard to the view that I have taken of the construction of Section 70 of the Contract Act with special reference to the word "Lawfully". Thirdly, the plaintiff has not pleaded section 70 of the Indian contract Act and the facts necessary to bring him within that section.

The next argument of Mr. Das for the plaintiff is that the plaintiff can claim this refund under section 65 of the Indian Contract Act. Here again Mr. Das's difficulty is that there is no pleading claiming protection under section 65 of the Indian Contract Act and stating the necessary facts to bring his client within the protection of that section. It has been held in a number of cases mostly unreported, the latest being one of Sarkar, J. that a party should not be allowed to take protection under section 65 of the Indian Contract Act unless he pleads it.

But the more important reason against the applicability of section 65 of the Indian Contract Act can be explained with reference to the language of the section. That section provides that when an agreement is discovered to be void or when a contract becomes void, any person who has received such an advantage under an agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it. The first requirement of that section is that either the agreement must be discovered to be void or the contract must become void. The use of the words "agreement" and "contract" designedly emphasises the distinction that is apparent from the interpretation clause contained in S 2 (g) and S.2 (h) of the Contract Act which describes an agreement not enforceable by law to be void

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and an agreement enforceable by law to be contract. A person who disregards an express and obvious statutory mandate such as contained in S.175 (3) of the Government of India Act 1935 or its present counterpart the constitutional provision of Article 299 of the Constitution whose effect is to render the agreement unenforceable against the Government cannot in my judgment attract the doctrine that the "agreement is discovered to be void" within the meaning of S. 65 of the Contract Act. I am not unmindful of the judicial gloss put upon this Section by numerous decisions including the pronouncements of the Privy Council in *Harnath Kaur* v. *Indar Bahadur Singh* (1), that an agreement void *ab initio* can also be an agreement "discovered" to be void under S. 65 of the Contract Act. Blazing the trail of the law on this branch is the decision of the Privy Council in *Mohori Bibee* v. *Dhuromdas Ghose* (2). All these decisions however are singularly unhelpful in deciding the present point before me. The word "discovered" to be void is not a cloak or excuse for igorance of law at the time of the contract. The word "discovered" must in my view mean that with available materials at the time of the agreement it could not be known that the agreement was void but subsequent materials or events not available at the time of the agreement disclose that it was void, and even void to such extent as renders it void *ab initio*. But I cannot persuade myself to believe that an agreement at its very inception in outright disregard of express statute or constitutional provision which render the agreement unenforceable against the Government can be said to be discovered to be void within the meaning of S.65 of the Contract Act. If that was the intention then all that S.65 of the Contract Act need have said is "whenever an agreement is void", and not "discovered to be void." The statutory illustrations under S. 65 of the Contract Act support that conclusion. While these statutory illustrations cannot control the Section of the Statute, in this case I find they support the construction that I have put on the word "discovered" in S. 65 of the Contract Act. The situation presented for

(1) [1922] L.R. 50 I. A. 69.
(2) [1902-3] L.R - 30 I. A. 114.

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decision in this suit also does not, in my opinion, come within the other expression in S.65 of the Contract Act, "when a contract becomes void." It is not a case where the contract has become void but was an agreement unenforceable at its very inception against the party charged upon it.

The Supreme Court in *Chaturbhuj Vithaldas Jasani* v. *Moreswar Parashram* (1) has made certain observations which are relevant on this point. Bose, J. of the Supreme Court at page 390 of that report says :—

> "It may be that Government will not be bound by the contract in that case, but that is a very different thing from saying that the contracts as such are void and of no effect. It only means that the principal cannot be sued ; but we take it that there would be nothing to prevent ratification, specially if that was for the benefit of the Government. There is authority for the view that when a Government Officer acts in excess of authority, the Government is bound if it ratifies the excess, see *Collector of Musulipatam* v. *Cavely Vencatanarain Apah* (2) We accordingly hold that the contracts in question here are not void simply because the Union Government could not have been sued on them by reason of Article 299(1)".

Now this observation clearly lays down that the contract or rather the agreement is not void when it does not satisfy the requirements of section 175(3) of the Government of India Act 1935 or Article 299(1) of the present constitution If they are not void, then section 65 of the Indian Contract Act can no longer be attracted, because it only applies in cases of void agreements or contracts, in the one case when discovered to be void and in the other when it becomes void. Mr. Das's reference to the Privy Council decision in *Surajmall Nagarmall* v. *Triton Insurance Co. Ltd.* (3) is

(1) [1954] S. C. A 373
(2) [1861] 8. M. I. A. 529
(3) [1924] L. R. 52 I.A. 126

not on the point because there the Statute, which was the Indian Stamp Act, had an entirely differently worded provision, namely "No contract for Sea Insurance shall be valid unless the same is expressed in a Sea Policy". S.175(3) of the Government of India Act or Art 299 of the Constitution, as pointed out by the Supreme Court in *Chaturbhuj's case* (1) does not speak of the validity of a contract in general but its enforceability against the Government.

For these reasons I hold that S. 65 of the Contract Act does not help the plaintiff to claim this sum from the Government in the fact and circumstances of this case.

This induced Mr. Das appearing for the plaintiff to invoke the protection of section 72 of the Indian Contract Act. His argument is that his client paid that sum of Rs 12,000/- under a mistake of law. In order to decide this point, it will be helpful to recall the provisions of section 72 of the Indian Contract Act which read as follows :

> "A person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it."

At one time there was a great conflict of judicial opinion on the point whether section 72 of the Indian Contract Act excluded mistake of law from its purview, one series of decisions holding that it did and the other series of decisions holding that it did not. The point was finally decided by the Privy Council in *Shri Shri Shiva Prosad Singh* v. *Maharaja Srish Chandra Nandy* (2). The point there arose that a lessee paid more royalty to the lessor under a mistaken construction of a particular mining lease. It was held there that he was entitled to recover it under section 72 of the Indian Contract Act. The effect of the observations of Lord Reid before the Privy Council at page 302 is that mistake of law will also be,

(1) [1954] S. C. A. 373.
(2) [1949] A. L. J. (P. C.) 464; L.R. 76 I. A. 244.

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covered in the circumstances of the case by section 72 of the Indian Contract Act, Mr. Das availed of this law laid down by the Privy Council and argued that his client made a mistake of law about the form of the contract and its effect in this case and paid money under that mistake of law. On that ground he claimed to come within the meaning of the decision of the Privy Council and on that ground he founded his claim for the refund of the sum of Rs. 12,000/-. This argument is ingenious and deserves careful examination. I see two fallacies in that argument.

Firstly, fallacy lies in overstretching Lord Reid's decision. Although Lord Reid put a construction on section 72 of the Indian Contract Act which included mistake of law within its purview, his lordship was careful to observe at page 302 :—

> "It may be well to add that their Lordships' judgment does not imply that every sum paid under a mistake is recoverable no matter what the circumstances may be."

His Lordship thereafter says that there may be circumstances which disentitle a plaintiff not only on the ground of estoppel but also "otherwise."

The *second* fallacy is in the assumption that this is a case of mistake of law. In my judgment it is not a case of mistake of law. Ignorance of law is not mistake of law. Deliberate disregard of law is not mistake of law. In the facts of this case it can either be ignorance of law or deliberate disregard of law. There is no possible third view of the facts in this case. Therefore the plaintiff cannot be said to come within the protection of the doctrine of mistake of law. The difficulty of applying Mr. Das's argument to the facts of this case

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is that in that case every one will be entitled to contend that he made a mistake of law. After all, every litigation is in the final analysis based on a mistake of law or of fact made by one party or the other. It cannot be the intention of section 72 of the Indian Contract Act that wherever and whenever and however a mistake of law occurs, a claim may be made under section 72 of the Indian Contract Act. That was expressly said not to be so by Lord Reid in the passage I have just quoted. Ignorance of law is not an excuse. It is not open to the plaintiff, in my view, to say that he did not know the effect of section 175(3) of the Government of India Act, 1935. As Lord Williams, J. points out in *Katherine Stiffles* v. *Carr Machertich Martin*(1) that ignorance of a particular right is on the same footing as ignorance of law and when money was paid voluntarily with full knowledge of all the facts, it cannot be recovered on the ground that the payment was made under a mistake of law. In fact, it is not really a mistake of law at all. Recalling the facts of the case where Lord Reid pronouneed the judgment of the Privy Council, there it was possible to take two contending views on the construction of a clause in the lease. Mistake of law means a possible mistake of law and not an impossible mistake of law. Here there was no room for mistake or doubt as to how contract should be entered into in order to bind Government under section 175(3) of the Government of India Act. In other words, this is not a case of mistate of law, however akin it might be to it. It is a disregard of the clear law. That is not a mistake. It is ignorance at best and disregard at the worst. In any event, it is not in my view a mistake.

The judicial mind is unconciously moved by the major inarticulate premise, in this branch of the law that no one should be allowed to unjustly enrich himself at the expense of another. The idea of a new obligation apart from the strict letter of contract, has been slowly and cautiously evol-

(1) [1934] 39 C. W. N. 174 at 185.

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ving in this branch of jurisprudence. The law so developed by judicial conscience appears to discover obligations to defeat unjust enrichment or unmerited acquisition by restitution. The natural tendency for the Courts wherever they find a case of unjust enrichment or unmerited acquisition, is justly to order its restitution. But a good deal of caution is necessary in applying these new categories of law like the unjust enrichment or unmerited acquisition to Government and public Administration of revenue. For one thing, a Public Exchequer is a peoples trust and the rigour and revulsion against unjust enrichment for individual ends become a little inappropriate and out of focus in the context of Government and Public Administration. While no doubt a Government, just like an ordinary individual, should not be allowed to unjustly and illegally enrich itself at the cost of its subjects, it is essential to remember that such enrichment in the case of Government, unlike an individual, neures for the people including perhaps the aggrieved subject. Secondly the law itself has prescribed as mandate certain indispensable formalities in the case of an enforceable contract against the Government. A Government has to be responsible and careful at both ends of the contract. A person entering into a contract with the Government has first to see that it has the legal competence to enter into the contract, and, secondly, it is to be seen that it is so entered in the form prescribed by Statute or Constitution that it is enforceable against the Public revenue. The hesitation in applying the rule against unjust enrichment has been understood by the House of Lords in *Sinclair* v. *Brougham* (1) which holds that a Corporation which receives and holds money in an *ultra vires* transaction cannot be held to return the money it holds wrongfully because no contract could be implied where no express contract could have been made. The doctrine of *ultra vires* transaction by a Corporation is not, however, the only case representing difficulty in applying the doctrine of unjust enrichment and its resti-

(1) [1914] A. C. 398.

tution. The case of Government and Public Administration represents another. Understood in that light, the conclusions that I have reached do not seem to me to be contrary to the basic principles against unjust enrichment or unmerited acquisition.

For the reasons that I have just stated, I am of the opinion that on the present facts and circumstances the plaintiff's claim for the sum of Rs. 12,160/- cannot come either under section 65 or section 70 or section 72 of the Indian Contract Act.

The second defence of the Union of India in this case is under the Rights, Property and Liabilities Order, 1947. It is contended on behalf of the Union that even if it were to be regarded as a contract in this case, the liability is on the Dominion of Pakistan under Clause 8(1) (a) of the Rights, Property and Liabilities Order, 1947. It is said that the contract here is for the "exclusive purposes" of the Dominion of Pakistan, within the meaning of that clause.

Now the actual tender was called from Comilla (Pakistan) when the tender was issued. But the bricks were at Agartala which is within the Indian Union. The plaintiff's document No. 1 shows that the money was paid in the Tipperah Treasury which is now within the Indian Union. But from the same document it appears that the authority was what was called "G. E. Comilla" in Pakistan. The plaintiff's own document No. 10, Clause 4, shows that this deposit of Rs. 12,160/- was made at Comilla Treasury, which is in Pakistan. Correspondence is mostly from Comilla, Kandipara in Pakistan. From that point of view, it appears to me that although the bricks were at Agartala the controlling authority being one of Comilla in East Pakistan, it is not unreason-

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able to consider this contract to be exclusively for the purposes of the Dominion of Pakistan. The situs of the movables the bricks, is not for this purpose the determining factor as the controlling authority which controlled their disposal. But I do not think that Clause 8 of the Rights, Property and Liabilities Order, 1947 at all applies to this case because the contract cannot be held to be a "contract made on behalf of the Governor-General in Council" within the meaning of that Clause before it does not conform with the statutory requirment of such contract as contained in section 175(3) of the Government of India Act. In my view, the more appropriate clause is Clause 10 of the Rights, Property and Liabilities Order which speaks of "an actionable wrong other than breach of contract" "Actionable wrong" here is used in a much wider sense than tort as pointed out by the Supreme Court in *The State of Tipperah* v. *Province of East Bengal*, (1). The cause of action in this case can be said to arise not wholly either within India or within Pakistan and in such a case Clause 10(1)(c) should apply which provides that in that event it will be a joint liability of the Dominions of India and Pakistan. In that case the proper forum to decide or allocate liability was the Arbitral Tribunal under Clause 13(1) of the Rights, Property and Liabilities Order. In a case where I am satisfied that the form of the contract does not meet the statutory requirements so as to be enforceable against Government, I do not feel persuaded to allow the plaintiff to recover only against the Union of India. I need only add here that the Dominion of Pakistan has not been sued even in Pakistan for this amount.

The next defence of the Union is that this Court has no jurisdiction to entertain and determine the suit It is contented on behalf of the Union that no part of the cause of action arose within the jurisdiction. The plaintiff seeks to find jurisdiction of this Court on the basis of his pleadings in paragraphs 9, 10 and 11 of the plaint. In Paragraph 9 of the

(1) [1951] S. C. (C. W. N.) 113 at p. 123.

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plaint, the plaintiff states that demand were made in the office of the D. C., Billing Centre, Fort William, Calcutta, which was within the jurisdiction of this Court. Curiously enough, it is not pleaded that refusal was within the jurisdiction of this Court. Paragraph 10 of the plaint rests content by pleading that D.C., Billing Centre, Fort William, Calcutta, which was dealing with this claim was within jurisdiction. But if the refusal by it is not pleaded, then I do not see how that founds the cause of action. Paragraph 11 of the plaint shows that notice under section 80 of the Civil Procedure Code was issued from within the jurisdiction of this Court. But the place of issue of the notice under section 80 is not important or relevant. To apply the notion of jurisdiction in respect of contracts formed by correspondence where both the places from where letters are sent and where they are received are relevant to the notice under S. 80 of the Civil Procedure Code, is to compare the incomparable. If section 80 of the Civil Procedure Code is part of the cause of action, although it itself is required to state the cause of action and it requires only that the plaint shall state that such notice has been delivered or left, then the place of the receipt of that notice and not the place of its issue determines part of the cause of action for there is the express emphasis in the language of that section on the place of receipt of the notice. On this analysis of paragraphs 9, 10 and 11 of the plaint, it will be found that in strict pleading no part of the cause of action is pleaded to have arisen within the jurisdiction. It is true that the plaint was instituted with leave under Clause 12 of the Letters Patent in this case. But nevertheless even thereafter it is always open to the Court to find, and I do find it in this case, that such leave was wrongly given. I, therefore, hold that this Court has no jurisdiction on the grounds claimed in the plaint. I need only add here that no jurisdiction is claimed for this Court

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because the Union of India either carries on business or resides within the jurisdiction of this Court. Even if such ground was claimed having regard to the numerous decisions, such ground would not have been upheld.

For these reasons, the suit fails and is dismissed but I make no order as to costs.

T. P. Mitra : Solicitor for the plaintiff.

S. K. Mondal : Solicitor for the Defendant.

R. M. *Suit dismissed.*

APPELLATE CIVIL.

Before Mr. Justice K. C. Das Gupta and Mr. Justice B. K. Guha.

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TABIRUDDIN MALLICK & ORS.
V.
PROTIVA RANI DEVI & ORS.*

Bengal Agricultural Debtors Act, Sec. 37A Sub-Sec. (1) (c) (iii) and Sub-Sec. (8)—Nature of an application under Sub-Sec. (8) and of an order passed upon such application—Whether it is open to a Civil Court in dealing with an application under Sub-Sec. (8) of Sec. 37A to go into the question whether or not an award is without jurisdiction because of the existence of a bona fide lease in favour of a person before 20-12-39—Whether a plaintiff can get relief against the surviving defendants if one of the defendants was dead before the hearing of the Suit.

The two appellants and their brother Fyzulla held the lands which are the subject-matter of the present litigation in occupancy raiyati right Their holding was sold in execution of a rent decree. On an application under Sec. 37A of Bengal Agricultural Debtors Act by the appellants and Fyzulla an award was made directing restoration of the lands to them. They then applied to the Civil Court under Sub-Sec. (8) of Sec. 37A in order to be put into possession on the strength of the award. The Civil Court granted the application.

Thereupon the respondent instituted the present suit with a view to get rid of the award and the order of ejectment. Her case in substance was that, as before 20-12-1939 the landlords had alienated the lands by a bonafide lease for valuable consideration, as mentioned in Sec. 37A (1) (c) (iii), to Phani Bhushan Bhattacharya, the award was without Jurisdiction and so the order of the Civil Court directing possession to be delivered on the strength of the award was not binding. The Trial Court held that that there was a bonafide lease in favour of Phani Bhushan before 20-12-39 and the award, therefore, was made without jurisdiction. In that view the Trial Court passed a decree in favour of the plaintiff.

The order passed by the Civil Court under Sub-Sec. (8) of Sec. 37A is in substance an order of restitution. Therefore an appeal lies against that order.

* Appeal from Appellate Decree No. 848 of 1950 against the decree of Sri N. C. Chakraborty, District Judge of Zillah Nadia in T.A. No. 20 of 1950 dated the 22nd of June, 1950 affirming the decree of Sri R. R. Biswas, Sub-Judge, Nadia at Krishnagar dated the 28th January, 1950.

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As regards the question, whether it is open to a Court hearing an application nnder Sec. (8) of Sec. 37(A) of Bengal Agricultural Debtors Act to go into the question of an award being without jurisdiction because of a bonafide lease contemplated by Sec 37A (1) (c) (iii), the Civil Court in deciding an application under Sub-Sec. (8) of Sec. 37A has to look to the provisions of that Sub-Sec. The provisions do not raise any question of there being any lease in favour of any person prior to 20-12-39. As executing court can go into the question whether a decree is void as being without jurisdiction, only if the lack of jurisdiction is apparent on the face of the record. An application under Sub-Sec. (8) of Sec. 37A is in the nature of an execution proceeding and so, if on the face of the record the award was without jurisdiction, the Civil Court dealing with an application under Sub-Sec. (8) should refuse to pass an order thereunder. The truth or otherwise of the ground on which the award is said to be without jurisdiction in this case, Viz., that there was a bonafide lease in favour of Phani Bhushan is by no means apparent on the face of the record. It can be decided only after a thorough investigation on evidence. That investigation cannot in law be undertaken by an executing Court. It is not therefore open to Civil Court in dealing with an application under Sub-Sec. (8) of Sec. 37A of Bengal Agricultural Debtors Act to go into the question whether or not the award is without jurisdiction because of the existence of a bonafide lease in favour of a person before 20-12-1939. A separate suit is, therefore, maintainable for decision of that question.

If Foyzulla, the brother of the appellant, was dead before the hearing of the suit, the decree will not affect Foyzulla or his heirs and legal representatives. But that is no reason why the plaintiff should not get relief as against the appellant.

Appeal by the Defendants.

Suit for getting rid of an award of Debt Settlement Board and an order of ejectment passed upon an application under Sub-Sec. (8) of Sec. 37A of Bengal Agricultural Debtors Act.

The material facts will appear from the judgment.

Jitendra Kumar Sen Gupta and *Hari Gopal Roy* for the Appellants.

S. C. Mitter for the Respondent.

The judgment of the Court was as follows:—

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K. C. Das Gupta, J:—The two appellants Tabiruddin Mullick and Bansi Mallick and their brothers Fyzulla held the lands which are the subject matter of the present litigation in occupancy raiyati right; the holding was, however, put up to sale in execution of a rent decree and purchased by the proforma defendants Protiva Sundari Dasi, Umasashi Dasi and Puspalata Dasi. On an application under Section 37A of the Bengal Agricultural Debtors Act by Tabiruddin, Bansi and Fyzulla, an award was made directing restoration of the lands to them. They applied to the Civil Court under Sub-Section (8) of Section 37A, in order to be put in possession on the strength of the award. As the landlord had in the meantime obtained a decree for rent against the heirs of a new tenant Phani Bhusan Bhattacharjee and Protiva Rani Debi had purchased the holding and had obtained possession through Court, the former tenants, Tabiruddin Mallick, Bansi Mallick and Foyzulla impleaded Protivarani Debi as well as the heirs of Phani Bhusan in this application. These heirs of Phani Bhusan as well as Protivarani appeared and prayed that their names should be expunged from the proceedings as they were not parties to the proceeding which resulted in the award. The learned Munsif rejected this prayer, held that none of the opposite parties were under-raiyats of the debtor and therefore all of them including Prativarani was liable to ejectment.

Thereupon Protivarani has instituted the present suit with a view to get rid of the award and the order of ejectment. Her case in substance is that as before the 20th day of December, 1939 which will be hereafter referred to as the relevant date, the landlords had alineated these lands by a *bonafide* lease for valuable consideration, as mentioned in 37A (1) (c) (iii), to Phani Bhusan Bhattacharjee, the award was without jurisdiction and so the order of the Civil Court directing possession to be delivered was itself void and is not binding against her. The defence was that as the order of the Civil Court under Sub-Section (8) was an appealable order, the only way in which the correctness of the order could be challenged was by way of appeal and as no appeal was filed, the order is binding on Section 37A of the Bengal Agricultural Debtors Act, including all the parties in the proceedings under Sub-Section (8) of

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the present plaintiff. An objection was also taken that the suit was barred under Section 47 of the Code of Civil Procedure. There was also a denial of the averment that there was a *bonafide* lease in favour of Phani Bhusan Bhattacharjee before the relevant date.

The trial court held that there was a *bonafide* lease in favour of Phani Bhusan before the relevant date, and so the award was made without jurisdiction and he also held that Section 47 was not a bar to the present suit, nor was the suit barred by the principle of res-judicata and passed a decree in favour of the plaintiff in the following terms:

> "That the suit be decreed with costs on contest against the principal defendants in presence of the pro-forma defendants. Plaintiff's alleged title to the suit land be declared, and her possession therein be confirmed. Let a permanent injunction be issued against the principal defendants—restraining them from taking possession of the suit land. It is hereby declared that the order passed by the Munsif Local and Court on 16-5-47 in Rent Execution Case No. 846 of 1937 is illegal, *ultra vires* and without jurisdiction. It be further declared that the principal defendants are not entitled to get possession of the suit land in terms of the order passed by the Munsif on 16-5-47. It is further declared that the order passed by the Nadia Special D. S. Board in Case No. 125/4 of 1943 is not binding against the plaintiff. It is also declared that the award passed in that case is illegal, ultra vires, without jurisdiction, and it is not binding against the plaintiff."

The appellate court agreed with these findings and dismissed the appeal.

A point appears to have been taken at the hearing of the appeal that defendant No. 3. Phani Bhusan Bhattacharjee had died long before the hearing of the suit in the Trial Court and consequently the entire suit should fail. The learned District Judge was of opinion that as this was a new point not taken before the Subordinate Judge, it would not be proper

to decide the point either way and if the heirs of Phani Bhusan were in any way affected by the decree, the question may be taken up subsequently in appropriate proceedings.

The main contention in appeal is that the order passed by the Civil Court in the application under Sub-Section (8) of Section 37A of the Bengal Agricultural Debtors Act was an appealable order and that the point now raised, viz., that the award was without jurisdiction on the ground that there being a *bonafide* lease in favour of Phani Bhusan before the relevant date should have been taken before the Civil Court and as it was not taken, the present suit is barred.

It has been held by this Court that the order passed by the Civil Court under Sub-Section (8) of Section 37A is in substance an order of restitution and in that view, an appeal would lie against that order. The question, however, remains whether it was open to the court hearing the application under Sub-Section (8) of Section 37A of the Bengal Agricultural Debtors Act to go into the question of the award being without jurisdiction because of the lease in favour of Phani Bhusan. If it was, there would be scope for arguments that the suit is barred. If it was not, it would be clearly open to an aggrieved party to challenge the award itself and any order made on the basis thereof is by a separate suit.

Prima facie, the Civil Court in deciding an application under Sub-Section (8) of Section 37A has to look to the provision of that Section. Sub-Section (8) is in these words:—

> "The debtor may present a copy of the award made under Sub-Section (5) to the Civil Court or Certificate officer at whose order the property was sold, and such Court or Certificate officer shall thereupon direct that the sale be set aside, that the debtor together with any person who was in possession of the property sold or any part thereof at the time of delivery of possession of such property to the decreeholder as an under raiyat of the debtor and who has been ejected there from by reason of such sale be restored to possession of the property with effect from the first day of Baisakh next following or the first

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day of Kartic next following, whichever is earlier, and that any person who is in possession of the property or part thereof as an under-raiyat of the debtor at the time of delivery of possession of such property to the decree holder shall be ejected therefrom with effect from that date."

These provisions do not raise any question of there being any lease in favour of any person prior to the relevant date. It was held in *Gorachand's Case* (1) that an executing court can go into the question whether the decree is void as being without jurisdiction, only if the lack of jurisdiction is apparent on the face of the record. The application under Sub-Section (8) of Section 37A is in the nature of execution proceedings and so if on the face of the record, the award was without jurisdiction, it might be said that the Civil Court dealing with an application under Sub-Section (8) should refuse to pass an order thereunder. The truth or otherwise of the ground on which the award is said to be without jurisdiction, viz., that there was a *bona fide* lease in favour of Phani Bhusan, is by no means apparent on the face of the record. It can be decided only after a thorough investigation on evidence. That investigation cannot in law be undertaken by the executing Court. I am therefore of opinion that it was not open to the Civil Court in dealing with the application under Sub-Section (8) of Section 37A of the Bengal Agricultural Debtors Act to go into the question whether or not the award was without jurisdiction because of the existence of a *bona fide* lease in favour of Phani Bhusan Bhattacharjee before the relevant date. My conclusion therefore is that a separate suit is maintainable for decision of that question.

It was next contended that the finding that there was a *bona fide* lease in favour of Phani Bhusan was vitiated by an error in law as Ext. 5 on which it was based was not admissible in evidence. It appears, however, that even if Ext. 5 is left out of account, Dakhila—Ext. 6 on which the court of appeal relied would show that this holding was settled with Phani Bhusan not later than the 17th May, 1938. In my opinion, there is, therefore, nothing that would justify us

(1) [1926] I L R 53 Calc. 166 (F B.)

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in interfering with the finding of the courts below and that there was a *bona fide* lease in favour of Phani Bhusan prior to the relevant date.

Lastly it was contended that as one of the three persons in whose favour the order under Sub-Section 8 of Section 37A was made, was dead before the hearing of the suit and his heirs were not brought on the record, it was not open to the court to go into the question whether the award is void. It is quite true that if Phani Bhusan was dead before the hearing of the suit, the result is that any decree passed by the Court in the present suit would not be binding against him or his heirs. That, in my opinion, is, however, no reason why the plaintiff should nof get relief as against the defendants Tabiruddin Mallick and Bansi Mallick. If in fact Foyzulla was dead before the hearing of the suit a fact which it is not necessary to investigate in the present appeal the decree will not affect Foyzulla or his heirs and legal representatives at all.

As all the grounds taken in the appeal fail, the appeal is dismissed with costs.

B. K. Guha, J.:—I agree.

P. K. D. *Appeal dismissed.*

CRIMINAL REVISION.

Before Mr. Justice Debabrata Mookerjee.

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BASANTA KUMAR GON
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THE STATE*

Indian Penal Code, Secs. 448, 441, 186—Criminal Procedure Code, Sec. 195—Elements which constitute offence under Sec. 448, I.P.C.—Import of Sec. 441, I.P.C.—Charge under Sec. 186, I.P.C., unsustainable in the absence of complaint as provided by Sec. 195, Criminal Procedure Code.

In order to constitute an offence under Sec. 448, I.P. Code, there must be an unlawful entry and there must be proof of one or other of the intentions mentioned in Sec. 441, I.P. Code. It has to be found upon evidence that the person concerned entered a place which was in the possession of another person and that the entry was made with a view to causing insult, annoyance or injury to that another person. If, after being asked to remove himself from a place, a person continues to stay on, that would amount to Criminal trespass within the meaning of Sec. 448, I.P. Code, provided the requisite intention is also established by the evidence on the record.

It is doubtful whether it can reasonably be said that a place where a public officer discharges public functions is in his exclusive possession. Sec. 441, I.P. Code, clearly means and implies that a person has to be in possession of a place in the sense that he is entitled to exclude another person if that other person enters the place. An attestation officer carrying on his duties in what is described as a camp cannot conceivably be held to be in possession of it in the sense in which the word possession is understood in Sec. 441, I.P.C.,—Possession mentioned in Sec. 441 is to be understood as meaning actual physical possession which includes the right to eject or exclude another person. The place where an assistant settlement officer functions as public officer is accessible to all members of the public who have business there and nobody can possibly be ejected except on special grounds. The special ground put forward in this case is that the petitioner made himself a nuisance by saying things or uttering words which he should not have said or uttered. The real offence, if any, that was committed in this case, therefore, was that of causing obstruction to a public functionary while discharging his public duties. The offence was under Sec. 186, I P Code. The charge under Sec. 186 is, however, unsustainable in the absence of a complaint in accordance with the provisions of Sec. 195, Criminal Procedure Code.

* Criminal Revision Case No. 787 of 1955.

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Application under Secs. 435 and 439 of the Code of Criminal Procedure by the Accused.

The material facts will appear from the judgment.

Sambhu Nath Banerjee and *Ganga Narayan Chandra* for the petitioner.

Soudhendra Kumar Basu for the State.

The judgment of the Court was as follows:—

Debabrata Mookerjee, J.:—The petitioner was convicted under Section 448 of the Indian Penal Code and sentenced to pay a fine of Rs. 100/-, in default to suffer rigorous imprisonment for four months. The trial was held by a Magistrate of Kalna upon two charges under sections 186 and 448 of the Indian Penal Code. The charge of offence relating to obstruction to a public servant under Section 186 I.P.C. was found unsustainable by the learned trying Magistrate on the ground that a proper complaint had not been made in accordance with the provisions of Section 195 of the Code of Criminal Procedure. The result was that the learned Magistrate acquitted the petitioner of the charge of offering obstruction to the public servant concerned in the discharge of public functions and the petitioner was convicted of the other charge under Section 448 I.P.C. and sentenced to a fine of Rs. 100/- in default to suffer rigorous imprisonment for four months.

The case for the prosecution briefly stated was that an Attestation Camp proceedings were going on the 4th of August 1954. The Attestation Officer was recording interests in Mouja Purba Khanpur in which the Gon Babus of Putsuri were interested as Darpatnidars. An agent of the Gon Babus was representing them and certain collection papers were placed for consideration of the Attestation Officer. The Officer however was not satisfied with the manner in which information asked for was being supplied and he asked the agent of the Gon Babus to go back to the kutchery and send some body who was really in a position to assist him. At about

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11-30 A.M. the petitioner, who was one of the proprietors of this estate, entered the attestation camp and appeared to be in temper. He remonstrated with the attestation officer that the documents were there to which reference could not be made for the purpose of completing his records and that there was no occasion whatever for the attestation officer to send for him. At this the attestation officer became very much annoyed and told the petitioner to clear out. The petitioner then flew into rage and uttered objectionable words to the effect that he would teach him a lesson and so on. This evidently caused some disturbance in the office and then a report was made as a result of which the petitioner came to be tried upon charges under Sections 186 and 448 I.P.C.

The petitioner denied the charges that had been framed against him and his case seems to be that the prosecution evidence is a gross exaggeration of what exactly happened at the camp. It is further the case for the defence that the petitioner did not come to the place on his own but that he had been sent for and he came on invitation from the attestation officer.

The learned Magistrate acquitted, as I have said above, the petitioner on the ground that there was no valid complaint against him for the alleged offence of offering obstruction to a public servant but convicted and sentenced him of criminal trespass under Section 448 I.P.C.

On behalf of the petitioner Mr. Banerjee has argued that the substance of the case against the petitioner is that he had offered obstruction to the public servant concerned in the discharge of his duty. That allegation relating as it does to a charge under Section 186 I.P.C. required a complaint in accordance with the procedure laid down in Section 195(1) of the Code of Criminal Procedure. There having been no such complaint the learned Magistrate had no alternative but to acquit the accused of the charge under that Section. As regards the remaining charge under Section 448 Mr. Banerjee has contended that this is nothing but the offence of offering obstruction to a public servant in a different garb which could not be tried without a proper and valid complaint.

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It appears to me that there is substance in Mr. Banerjee's contention. The real complaint in this case is that there was obstruction to a public servant in the discharge of public functions. Now it is an offence which is covered by Section 186 I.P.C. That section requires that before a prosecution for such obstruction can be launched there must be a previous complaint made either by the public servant concerned or by some officer to whom the public servant concerned or by some officer to whom the public servant is subordinate. Section 195(1) (a) lays down that before congnizance can be taken of an offence under Section 185 and other cognate sections of the Indian Penal Code, there must be a complaint by the public servant concerned or by some public servant to which the public servant is subordinate. As a matter of fact, in the present case, there has been no such complaint and in that view the Magistrate felt compelled to acquit the accused petitioner. I think it cannot be said that since the petitioner appeared before an attestation officer although on invitation and behaved in a manner which did not redound to his credit he should be held guilty under Section 448 I.P.C. Under the latter charge there must be an unlawful entry and there must be proof of one or other of the intentions mentioned in Section 441 of the Code. It had to be found upon evidence that the person concerned entered a place which was in the possession of another and that the entry was made with a view to causing insult, annoyance, of injury to the person concerned. I do not think it possible to say on the evidence in the case that there was such intention present on the part of the petitioner.

On behalf of the State it was strenuously contended that even after the petitioner had been asked to remove himself from the place he continued to stay on; that would it is argued, amount to criminal trespass within the meaning of the section provided the requisite intention is also established by the evidence on the record, I am not unmindful of the circumstance upon which reliance has been placed by the State for the purpose of supporting the conviction under Section 448; but I have grave doubts whether it can reasonably be said that the place where a public officer discharges public functions can be said to be in exclusive possession of the place

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where he discharges those functions. I doubt whether the attestation officer can be said to be in such possession as is contemplated in Section 441 in order that the act of the petitioner might be said to come within the mischief of criminal trespass as defined and understood in the Indian Penal Code. To my mind Section 441 clearly means and implies that a person has to be in possession of a place in the sense that he is entitled to exclude another if that other person enters the place. The attestation officer carrying on his duties in what is described as a camp cannot conceivably be held to be in possession of it in the sense the word possession is understood in Section 441 I.P.C. I understand possession mentioned in Section 441 as meaning actual physical possession which includes the right to eject or exclude another person. To all intents and purposes the assistant settlement officer was functioning as public officer at the place and all members of the public who had business had a right of access and no body could possibly be ejected except perhaps on special grounds. The special ground here pur forward is that the petitioner made himself nearly a nuisance by saying things or uttering words which he should never have said or uttered. That really clinches the matter, makes the position clear and establishes the fact that the real offence, if any, that was committed was that of causing obstruction to a public functionary while discharging his public duties. Unfortunately for the prosecution that charge could not be held proved as it was found that the requisite complaint had not been made by the public servant concerned. It may be unfortunate in the extreme that a contumacious person who did not behave properly before an officer goes unpunished; but then the law has got to be administered by this court as it finds it and no evasion can be permitted or circumvention of statutory procedure encouraged.

The result therefore is that although the act or the conduct of the petitioner might have deserved condemnation, nevertheless he cannot possibly be convicted of an offence under Section 448 of the Indian Penal Code. The only charge of offence that was possible in a case of this kind was a charge under Section 186 of offering obstruction to a public servant when discharging his public functions. That charge failed but

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that will not entitle me to hold that the evidence in the case established the remaining charge under Section 448 I.P.C. The officer concerned might have good reasons to feel insulted or annoyed at the conduct of the petitioner but that does not mean that the petitioner committed criminal trespass, by entering the place in possession of the officer with one or other of the several intentions mentioned in Section 441 of the Code.

The result therefore is that this Rule is made absolute. The conviction and sentence under Section 448 of the Indian Penal Code are set aside. The fine, if paid, will be refunded.

—P.K.D. *Rule made absolute.*

CIVIL REVISION.

Before Mr. Justice D. N. Sinha

Civil 1955

February, 21.

PROFULLA CHANDRA CHAKRAVORTY

V.

THE MUNICIPAL COMMISSIONERS OF JALPAIGURI*

Bengal Municipal Act, Secs. 66(2) (iii), 67(3)—If the two Sections are reconcilable—While Sec. 66(2) (iii) gives the general power of dismissal; it is modified by Sec. 67(3) in the case of certain category of employees —Retrospective order of dismissal, if tenable.

It is possible to reconcile the provisions of Sec. 66(2) (iii) and the provisions of Sec. 67(3) of the Bengal Municipal Act. While Sec. 66(2) (iii) gives the general power of dismissal, it is modified by Sec. 67(3) in the case of certain categories of employees, in whose case there has been granted a statutory safeguard, namely, existence of a resolution to which not less than two-thirds of the entire body of Commissioners subscribed their votes. In such cases where the Municipality has failed to obtain the requisite number of votes, the consent of the State will not improve matters and is of no avail. There is nothing wrong in principle, since these officers appear to be holding offices of some importance in the municipality and the legislature thought that their dismissal should not be left to the vagaries of a minority of the Commissioners, irrespective of whether their views concided with the State Government or not. It is settled law that a retrospective order of dismissal is not tenable.

Application for Revision under Art. 226 of the Constitution of India.

The material facts will appear from the judgment.

Jitendra Mohan Banerjee and *Manas Ranjan Chakravarti* for the Petitioner.

Santosh Kumar Basu and *Diptikona Basu* for the Opp. Party.

The judgment of the court was as follows:—

* Civil Revision Case No. 3441 of 1953.

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Prafulla Chandra Chakravorty v. The Municipal Commissioners of Jalpaiguri

D. N. Sinha, J.

D. N. Sinha, J.:—The petitioner at the relevant period was employed as a Sanitary Inspector under the Municipal Commissioners of Jalpaiguri who constituted the Jalpaiguri Municipality. In or about the 9th May, 1951 he was dismissed from the Municipality but it is not necessary to deal with this order of dismissal as it has been subsequently set aside by Government and it is nobody's case that the order became effective. At a meeting of the Commissioners held on the 3rd August 1953, it was resolved that certain charges should be formulated against the petitioner and the Resolution proceeded as follows:—

> "It is hereby resolved that Sri Prafulla Chandra Chakravarty be called upon to submit his explanation or replies to the said charges by 11-8-53. He is to show cause in writing why on the said charges adequate punishment shall not be awarded to him and he shall not be dismissed from service or otherwise dealt with."

Thereafter, three charges were framed. The petitioner showed cause. The Commissioners met at a special meeting on the 19th August, 1953 to consider his explanation. It appears that the petitioner was personally present. The Commissioners considered the charges and found them established. The minutes of that date proceeds to say as follows:—

> "The Commissioners found all the charges against him fully established and he was given another opportunity to show cause why he should not be dismissed from the service with effect from 20-2-51 date from which he absented himself from duty. He did not avail himself of that opportunity and refused to make any statement orally beyond what he has stated in the written reply dated 17-8-53."

> "It was resolved that the petitioner is hereby dismissed from service with effect from 20-2-51."

The petitioner challenges this order of dismissal on the

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ground that he belongs to a category of employees of the Municipality who by virtue of Section 67(3) of the Bengal Municipal Act 1932, could only be removed from office by the votes of not less than two-thirds of the whole number of Commissioners of the Municipality. According to him the Resolution was not supported by two-thirds of the whole number of Commissioners of the Municipality. In the affidavit-in-opposition it has been admitted that the Resolution was not supported by two-thirds of the whole number of Commissioners of the Municipality, by virtue of the fact that two of the members refused to attend the meeting and hence the requisite two-third majority could not be procured. It is stated however that even though the requisite two-third majority could not be procured, still the petitioner could be removed with the consent of the State Government under Section 66(3) (iii) of the said Act. It is said that the matter has been forwarded to Government and is pending their decision. The result is that, looked at from any point of view, the petitioner has not yet been dismissed in accordance with law. If that is so, he should have been told that the matter was pending decision of the State Government and I think that in the absence of such an intimation he is perfectly justified in making this application as the Resolution prima facie purports to dismiss him from service. The point which I have to decide in this case is within a small compass, namely, whether on the facts and circumstances of this case Section 66(2) (iii) applies or Section 67(3) applies. Mr. Basu argues that Section 66 speaks in general terms about the appointment and dismissal of the employees of the Municipality and Section 66(2) (iii) lays down in general terms that if a person holds an office carrying a monthly salary of Rs. 100/- or more (which is the case here) such an employee can be dismissed if the Resolution is supported by the votes of not less than two-thirds of the whole number of Commissioners of the Municipality. But if the requisite number of votes cannot be obtained, still he could be dismissed with the consent of the State Government. On the other hand Mr. Banerjee appearing on behalf of the petitioner argues that Section 67(3) lays down a special procedure to be adopted in the case of certain category of employees including that of a Sanitary Inspector.

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According to Mr. Basu, the whole of Section 67 deals with the case where the Commissioners filed to appoint certain officers and the Government compels them to do so. I regret I am unable to accept this argument. With regard to Section 67(1) and 67(2) it is clearly so. In fact, in Section 67(2) it has been specifically said that it would apply in the case of an officer "appointed under Sub-Section (1)." There is no such limitation laid down in Section 67(3), and it is an ordinary rule of interpretation that one cannot read words into a Statutory provision which are not there. It is, in my opinion, possible to reconcile between the provisions of Section 66(2)(iii) and Section 67(3). While Section 66(2)(iii) gives the general power of dismissal, it is modified by Section 67(3) in the case of certain category of employees, in whose case there has been granted a statutory safeguard, namely, by existence of a Resolution to which not less than two-thirds of the entire body of Commissioners subscribed their votes. In such cases, where the Municipality has failed to obtain the requisite number of votes, the consent of the State will not improve matters and is of no avail. I do not think that there is anything wrong on principle, since these officers appear to be holding offices of some importance in the Municipality and the Legislature thought that their dismissal should not be left to the vagaries of a minority of Commissioners, irrespective of whether their views coincided with the State Government or not.

In my opinion, therefore, the order cannot be supported in any event. At first I pointed out that inasmuch as it is admitted that the order complained of is not an order of dismissal, it would be quite sufficient to restrain the respondents from giving effect to it unless it is legally complete. Mr. Basu has however pointed out that the State Government also is waiting to hear an authoritative interpretation of Sections 66 and 67 of the Act, and that he would welcome a decision upon their proper interpretation.

In view of the fact that the consent of the State Government is irrelevant, the order of dismissal must be the impugned Resolution and therefore it is necessary that reliefs

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should be given to the petitioner in respect thereof. There is another point taken, namely, that the order purports to be retrospective. Mr. Basu has frankly confessed that he is unable to support the order so far as it is retrospective, as it is now fairly established that a retrospective order of dismissal is not tenable.

The result is that the Rule must be made absolute and there will be write in the nature of Mandamus directing the respondents to forbear from giving effect to the order of dismissal contained in the Resolution of the Municipal Commissioners dated the 19th August, 1953 and the same is hereby quashed, cancelled and set aside. If the Municipality still wishes to proceed against the petitioner, it will do so in accordance with law. He must be restored to the same position as if the order was not made. Inasmuch as the application involves an interpretation of law I make no order as to costs.

Rule made absolute.

K.P.D.

APPELLATE CIVIL

Before Mr. Justice K. C. Das Gupta and Mr. Justice B. K. Guha.

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March, 3.

THE COMMISSIONER OF WAKFS, WEST BENGAL.

V.

SHYAM SUNDAR DEBANSHI & ORS.*

Bengal Wakf Act, Sec. 70(3)—Land Revenue Sales Act, Sec. 6—Whether a sale held by the collector for arrears of revenue, where notification under Sec. 6 of the Land Revenue Sales Act was issued without previous compliance with the provisions of Sec. 70(3) of the Bengal Wakf Act, is without Jurisdiction and a nullity.

Even if no notification was issued at all under Sec. 6 of Act XI of 1859, the sale of a Wakf property for arrears of revenue would not be without jurisdiction and that where the notification was issued without previous compliance with the provisions of Section 70(3) of the Bengal Wakf Act the Collector's jurisdiction to hold a sale would not be affected and that the sale would not be a nullity.

Raja Gobinda Lal Roy's case (1) followed and *Purna Chandra Chatterjee* v. *Dinabandhu Mukherjee* (2) distinguished.

Appeal by the Plaintiff.

The suit was by Commissioner of Wakfs for a declaration that a sale of Wakf property held by the Collector for arrears of Revenue without compliance with Section 70(3) of the Bengal Wakf Act is a nullity and for recovery of possession of the Wakf property through the mutwalli.

The material facts will appear from the judgment.

Syed Nausher Ali and *C. F. Ali* for the Appellant.

* Appeal from Appellate Decree No. 797 of 1949 against the decree of Sri A. C. Ghose, District Judge, Zillah Birbhum at Suri in T.A. No. 54 of 1948 dated 19-5-49 affirming the decree of Sri B. M. Roy Chowdhury Sub-Judge, Birbhum, dated the 17-2-48.

(1) (1889) L.R. 20 I.A. 165.
(2) (1913) 17 C.W.N. 1135.

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The Commissioner of Wakfs. West Bengal v. Shyam Sundar Debanshi

March, 3

A. C. Gupta, Hari Prasanna Mukherjee and *Amiya K. Mukhopadhyay* for the Respondents.

The judgment of the Court was as follows:—

K. C. Das Gupta, J.:— This appeal is by the Commissioner of Wakfs, West Bengal, against the decision of the District Judge of Birbhur dismissing his suit in respect of a Wakf property which was sold for arrears of revenue; and raises the question whether non-compliance with the provisions of Section 70(3) of the Bengal Wakf Act makes the sale void.

The subject-matter of the suit is 8 annas share of Touzi No. 928 of the Birbhum—Collectorate for which there was a separate account. It belonged originally to one Mahammad Hossain who made a Wakf of the properties by a Wakfnama, dated the 26th June, 1912. The property was sold at a revenue sale, for arrears of revenue, by the Collector of Birbhum, for default in payment of revenue for the September Kist of 1936 and was purchased by the respondent Shyamsundar Debansi.

Before the property was notified for sale, the notice as required by Section 70(3) of the Bengal Wakf Act was not given to the Commissioner of Wakfs. The Commissioner of Wakfs however applied to the Collector of Birbhum for vacating the sale on this ground but the application was rejected. An appeal to the Commissioner of the Division was also rejected. In the present suit, the Wakf Commissioner has asked for a declaration that the sale was a nullity and for recovery of possession of the disputed property through the Mutwalli of the Wakf property.

The defence was that the suit was not maintainable and further that the disputed property was never Wakf.

The Courts below rejected the defence contention that the property was not Wakf but held that the suit was not maintainable.

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The finding of fact that the property was Wakf cannot, and, is not, disputed before us and the only question with which we are now concerned is whether the omission to serve notice as required under Section 70(3) of the Bengal Wakf Act, affected the jurisdiction of the Collector to hold the sale. It is not disputed that if in consequence of this omission to serve this notice the Collector had no jurisdiction to hold the sale, nothing passed by the sale and the suit as well as the present appeal should succeed nor is it disputed that if inspite of non-service of the notice the sale was not a nullity, the present suit and the appeal must fail.

On behalf of the plaintiff appellant, Mr. Nausher Ali contended that before a notification had been duly served under Section 6 of the Land Revenue Sales Act, the Collector could have no jurisdiction to sell and as the law as enacted by the Bengal Wakf Act was that the issue of notification would be illegal before the service of notice under Section 70(3) on the Commissioner of Wakfs, the position in law is that there was no proper service of the notification. Consequently, he argued that the sale was without jurisdiction.

For the proposition that the Collector could have no jurisdiction to sell if a notification under Section 6 of the Revenue Sales Act was not served, Mr. Nausher Ali relied on a decision of the Full Bench of this Court in *Lala Mobaruk Lal* v. *The Secretary of State for India in Council*, (1). In that case, the Full Bench held by a majority that non-compliance with the provisions of Section 6 of Act XI of 1859 was not a mere irregularity and a sale without complying with these provisions would be null and void.

In *Raja Gobind Lal Roy* v. *Ramjanam Misser* (2), Tottenham & Gordon, JJ. held that the Collector had acted illegally in selling the estate which was under attachment without a notification under Section 5, such a sale being absolutly prohibited by Section 5 and 17 of the Act and relying on *Lala Mobaruk Lal's case* (1) held that as these were illegalities as distinct from irregularities, Section 33 of the Revenue Sales Act did not apply and the sale was a nullity. This decision

(1) (1889) I.L.R 17 Cal. 398.
(2) (1893) L.R. 20 I.A. 165.

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was however reversed by the Privy Council in *Rajah Gobind Lal Roy* v. *Ramjanam Misser* (1) as their Lordships were of opinion that "a sale is a sale made under Act XI of 1859 within the meaning of the Act, when it is a sale for arrears of Government revenue held by the Collector or other officer authorised to hold sales under the Act, although it may be contrary to the provisions of the Act, either by reason of some irregularity in publishing or conducting the sale, or in consequence of some express provision for exemption having been directly contravened."

Quite clearly, the view that found favour with the Full Bench of this Court in *Lala Mobaruk Lal's Case* (2) was negatived by the Privy Council in *Raja Gobinda Lal Roy's case* (1). It may be mentioned in this connection that after the Privy Council's decision in *Raja Gobinda Lal Roy's case* (1), this Court had again to consider in *Radha Charan Das* v. *Sharfuddin Hossain* (3), about the effect of a sale held without proper service of notification under Section 6. Richardson and Newbould JJ. while holding that there had been sufficient compliance with the provisions for notification, expressed the further opinion that the Privy Council decision in *Rajah Gobind Lal Roy's case* (1) 'practically' overruled the decision of the Full Bench of this Court in *Lala Mobaruk Lal's case* (2) and that on the authority of the Privy Council ruling, this Court would be bound to hold that the sale could not be annulled by a Civil Court in consequence of the omission to publish the notification.

Mr. Nausher Ali drew our attention also to the decision in *Purna Chandra Chatterjee* v. *Dinabandhu Mukherjee* (4) where a Full Bench of this Court held that a sale under the Public Demands Recovery Act without service of notice under Section 10 of that Act was a nullity. Maclean C. J. delivering the judgment of the Full Bench observed:—

"The question raised is one of considerable nicety, and not free from doubt as no general test can be applied

(1) (1889) I.L.R. 11 Cal. 898.
(2) (1893) L.R. 20 I.A. 165.
(3) (1913) 17 C.W.N. 1135.
(4) (1907) I.L.R. 34 Cal. 811.

to determine whether in a given set of circumstances, an act is without jurisdiction and consequently void or only amounts to an irregular or illegal exercise of jurisdiction, and, therefore, merely voidable. It is clear, however, that the view put forward on behalf of the respondents, if adopted, does afford an intelligible basis for the rule uniformly followed for many years past by this court, namely, that a sale held without service of a notice under Section 10 which is a condition precedent to the validity of the sale, is a sale wholly without authority and is a nullity. Under these circumstances, we are not prepared to dissent from this rule which has been followed in numerous cases."

As in that case the Full Bench was concerned with the scheme of the law embodied in the Public Demands Recovery Act, their Lordships did not refer to the decision of the Privy Council in *Raja Gobinda Lal Roy's case* (1) and, obviously for the same reason, Dr. Rashbehari Ghosh, who contended that the omission to serve notice under Section 10 of the Public Demands Recovery Act did not affect the Collector's jurisdiction to sell, did not also refer to *Raja Gobinda Lal Roy's case* (1). It may be that so long as the decision of the Full Bench as regards the effect of the omission to serve notice under Section 10 of the Public Demands Recovery Act is not overruled by another Full Bench of this Court or by the Supreme Court, we would be bound to hold that a sale under the Public Demands Recovery Act without service of notice under Section 10 of that Act is a nullity; but that has nothing to do with the question whether a sale under Act XI of 1859 without a notification under Section 6 of that Act is a nullity—a question covered clearly by the authority of the Privy Council decision in *Raja Gobinda Lal Roy's case* (1).

In my judgment, the position clearly is that even if no notification has been issued at all under Section 6 of Act XI of 1859, the sale will not be without jurisdiction. The conclusion necessarily follows that where, as in the present case, the notification was issued without previous compliance with

(1) (1893) L.R. 20 I.A. 165.

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the provisions of Section 70(3) of the Bengal Wakf Act, the Collector's jurisdiction to hold a sale is not affected and that the sale is not a nullity.

As I have already indicated, it is not disputed that in the circumstances of this case the suit must fail unless the sale is a nullity. It is not necessary, therefore, to consider the further question that was raised whether as regards the injury consequential on the omission to comply with the provisions of Section 70(3) of the Bengal Wakf Act the remedy is limited to the special remedy provided in sub-section (5) of Section 70.

I would, accordingly, dismiss this appeal with costs.

B. K. Guha, J.:—

I agree.

P.K.D.

Appeal dismissed.

(1) (18893) 20 I A. 165

CRIMINAL REVISION.

Before Mr. Justice R. P. Mookerjee
and Mr. Justice P. K. Sarkar.

Criminal

1955

September, 6

BIMALAPATI BANERJEE
V.
SAILENDRA NATH GANGULY & OTHERS*

Contempt of Court—Bailiff of Small Cause Court, Calcutta, deputed to execute writ for delivery of possession—If ought to refrain from executing the writ, when he was shown an authenticated copy of an interim order passed by the High Court for stay—The conduct of the bailiff, when amounts to contempt of Court.

When a Sheriff or Bailiff is shown an authenticated copy of an order passed by a superior court staying execution of a writ, it is desirable that the Sheriff should come back.

If the Bailiff finds that there is opposition and if he considers that the opposition is such that possession cannot be delivered without applying force, the rules of the court provide that the Bailiff has to return to the court for being armed with necessary powers and help. The mistake on the part of the Bailiff in using force without being properly armed by an order of the court does not however make his offence a culpable one for contempt of court. Such an offence comes under a different category.

If the Bailiff had even when informed of the interim order passed by the High Court merely expressed in a normal way that he was bound to carry out the directions contained in the writ issued to him, no serious objection could have been taken to the same. But the Bailiff by his conduct and by the language used by him indicated his indifference and contempt of the Judiciary and of the High Court in particular. The entire episode and the atmosphere created have to be regarded as one incident and cannot be split up into component parts. Contempt of court is constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties, litigents or their witnesses during the litigation

Proceeding for Contempt of Court.

The material facts will appear from the judgment.

Lala Hemanta Kumar and *Ganga Narain Chanda* for the Appellant-petitioner.

Manindra Nath Ghose and *Anil Kumar Sett* for Bailiff Opposite party No. 2.

Charu Chandra Ganguly for the Plaintiff-Decree holder Opposite party No. 3.

Nirmal Chandra Chakraborty for the State.

* Criminal Misc. Case No 96 of 1955.

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Bimalapati Banerjee v. Sailendra Nath Ganguly

September, 6.

The Judgment of the court was as follows:—

R. P. Mookerjee, J.:—Joggeswar Banerjee one of the opposite parties had filed a suit in the Presidency Court of Small Causes praying *inter alia* that Bimalapati, petitioner in these proceedings, be ejected from premises No. 16, Blacquire Sq., Calcutta. The suit was dismissed by the trial Judge. On appeal a decree in ejectment was passed. The defendant petitioner Bimalapati filed a Second Appeal (S.A. 513 of 1955) against the said decree. This appeal was admitted on March 11, 1955 after a preliminary hearing under Order 41 Rule 11 of the Code of Civil Procedure. On the same day the defendant-petitioner filed an application for restraining the plaintiff-decree-holder from executing the decree and also for an ad-interim order pending the hearing of the Rule. A Rule was issued to show cause why further proceedings in execution should not be stayed. An ad-interim order was passed on the following terms:—

"Ad-interim injunction is granted till the 25th April, 1955 for the present and will continue thereafter till the disposal of this rule if Rs. 250/- is deposited as directed. The Court below will intimate to this Court as soon as the money is deposited and retain the same pending further orders of this Court. This Rule is made returnable on the 2nd May 1955."

In pursuance of the order passed by this Court a letter dated March 16, 1955 was issued communicating the terms of the order. This letter communicating the Court's order was received in the English Department of the Presidency Small Cause Court on March 18. The Registrar of the Court of Small Causes sent the letter from this Court to the passing clerk of the 4th Bench of that Court in which the execution case was pending.

It appears from the records that a tabular statement for levying execution bearing the date March 21, 1955 was filed by the decree-holder on March 24th; this was subsequent to the receipt of the said order from the High Court. As required under the rules a draft Writ for delivery of possession was filed by the decree-holder on March 28. On April 5, the Writ for delivery of possession was issued under the signature of the Superintendent to the Bailiff Sailendra Nath

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Ganguly, one of the opposite parties for delivery of possession as under the decree. The returnable date was fixed for April 30, 1955.

Immediately after the receipt of the Writ by the Bailiff the latter went the next day to the premises at about 1 p.m. The plaintiff was present personally, as to how many other persons were also present is a matter of dispute as also the circumstances under which possession was delivered by the Bailiff to the plaintiff-decree-holder. According to the version of the plaintiff and the Bailiff the son of the Judgment-Debtor who was present delivered peaceful possession and the latter along with the members of the family came out of the portion of the premises occupied by them. On the other hand, the Judgment-debtor maintains that force was used and inspite of the plaintiff and the Bailiff being intimated about the interim order staying execution proceedings as passed by the High Court, the Bailiff used force and turned out the Judgment-debtor's family throwing out and damaging his moveables.

The defendant petitioner has also alleged that the fact that a stay order had been issued by the High Court was known both to the plaintiff as also to the Bailiff from before and that there was a conspiracy between some of the officers of the Court of Small Causes including the Bailiff opposite party and the plaintiff who are responsible for the illegal and unauthorised acts done in utter violation and defiance of the order passed by this Court.

The petitioner had in the original petition made the Registrar of the Court of Small Causes a party to the illegal and improper acts as alleged. When the application was first moved before us we called for reports from the Chief Judge of the Presidency Court of Small Causes and from the Registrar of this Court for eliciting the point of time when the order was passed by us on March 11, 1955 had been issued, reached the Small Causes Court and the circumstances under which the Writ for delivery of possession was issued by the executing Court after the said stay order had been forwarded by this Court.

We were not satisfied that any prima facie case had been made against the Registrar of the Court of Small Causes. On the materials then before us we issued a Rule on May 18, 1955

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on the Bailiff, Sailendra Nath Ganguly and the decree-holder Joggeswar Banerjee to show cause why they should not be held liable for contempt of Court and appropriate action taken against them.

We have now heard the learned Advocates for the opposite parties and the petitioner as also the Senior Govt. Pleader who has appeared for the State.

Affidavits have been filed by the petitioner and the opposite parties, some sworn by the parties themselves and the rest affirmed by persons who are stated to have been present at the time of the alleged occurrence.

In showing cause the decree-holder opposite party had denied that he had any previous knowledge of the ex parte stay order which had been issued by this Court or that they had been party to any conspiracy as alleged.

The allegations on which the case for contempt is founded may be broadly divided under two heads. In the first place it is alleged by the petitioner that the parties concerned were cognisant of the fact that an interim injunction had been issued by this Court. In defiance of such order the Bailiff and the plaintiff had intentionally violated the injunction issued by this Court.

The second part of the allegations turned on the incidents which had happened when the Bailiff had gone to the premises in question and delivered possession to the plaintiff opposite party.

According to the defendant petitioner he had immediately after the issue of the interim order by this Court spoken to the plaintiff decree-holder, the latter living in another part of the same premises with the judgment-debtor. It is difficult to accept this part of the case as made by the defendant. The plaintiff was not admittedly on speaking terms with the defendant. It is improbable that the defendant would under such circumstances speak to the plaintiff. It was suggested that the plaintiff speaking aloud from his part of the quarters the defendant heard from another portion of the same premises the purport of the Court's interim orders. It is not likely that the plaintiff had any information about the interim injunction at this stage.

Even though it be not accepted that the plaintiff had information on the day the Rule was issued it is unlikely that the plaintiff had information as alleged. The conduct of the parties and the circumstantial evidence belied that the plaintiff had information from the day the interim order was passed.

The injunction was issued by this Court on March 11. The information reached the Court of Small Causes on March 18th. That intimation passed through the normal channel to the clerk whose duty it was to make the relevant entry 'in the after-judgment record.' The circumstances under which the necessary entry had not been made by this Clerk have been the subject matter of proceedings drawn up by the Chief Judge, Court of Small Causes against the said clerk; for in any view he was grossly negligent. The said clerk is not one of the opposite parties in the proceedings now before us. The materials in this record are also not sufficient to pronounce any opinion as to the complicity if any of the said passing clerk in the matter of the disobedience of the injunction order passed by this Court.

The learned Chief Judge of the Court of Small Causes has reported that proceedings have been drawn up against the passing clerk for his failure to make the necessary note which has given rise to the various complications and is the subject matter of the present proceedings.

The tabular statement for levying execution was filed by the decree-holder on March 21, 10 days after the issue of the Rule and 3 days after its receipt by the executing court. Other steps which are required to be taken by the decree-holder were taken on the 24th and 28th March. The Writ to the Bailiff was issued on the 5th of April.

It is most unlikely that a decree-holder, already cognisant of the interim order issued by this Court, will take steps for obtaining possession in violation of the order of the High Court, knowing full well that even if it be possible to obtain possession in ignorance of or in violation of the High Court order the decree-holder would not be able to retain possession after the mistake or the improper act comes to light. The steps which were taken by the decree-holder were not as prompt and expeditious as would have been if the decree-holder had knowledge of the interim order and was trying to humiliate

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the defendant there are no materials on which such a case can be made. The conduct does not fit in with the previous knowledge of the plaintiff as alleged.

As regards the allegations of conspiracy or the complicity of the passing clerk no sufficient materials have been placed before us to come to definite findings. We do not express any opinion on the conduct of either the passing clerk or any other officer or officers of the court as all the relevant materials are not before us.

All we can and need hold is that the petitioner failed to prove in the present proceedings and for the purpose of this rule, that the decree-holder was aware of the issue of the interim injunction or of having got the Writ for delivery of possession after entering into a conspiracy with known or unknown persons.

So far as this part of the case is concerned the Bailiff opposite party does not come into the picture.

On the conclusion reached as above no offence has been brought home so far as either of the two opposite parties are concerned at this stage.

We next proceed to consider what had happened on April 6, 1955 and whether either the decree-holder or the Bailiff opposite party has been proved to have committed an offence for which they may be proceeded against for contempt of court.

The petitioner's case is that on the 6th April 1955, when he was away from his residence, Sailendra Nath Banerjee, the Bailiff came to his house in question at about 1 p.m. Though there was no order to take police help the said Bailiff took with him two other persons and two public women, who sell betel leaf on the street near the court of Small Causes, the former representing themselves as officers of Court while the latter as women constables. The defendant—Petitioner's son and the female members of his family told the Bailiff that an order staying execution had been made by the High Court and the Writ for delivery of possession must have been given through inadvertance or mistake. The Bailiff was requested to make enquiries before executing the Writ. The Bailiff thereupon is said to have used defamatory language against the Court some of which are mentioned in paragraph 14 of the petition. The two women, who accompanied the Bailiff

and were neither constables nor Officers of the Court, dragged out the female inmates of the house under the orders of the said Bailiff.

The said Bailiff with the assistance of the two others persons, who accompanied him brought out the moveables in the house and damaged or destroyed them all. These incidents are alleged to have taken place in the presence of a number of respectable gentlemen of the locality whose names are given in paragraph 13 of the petition. Some of these witnesses have filed in this Court affidavits in support of the petitioner's case. The Bailiff opposite party is also alleged to have wrongfully restrained the petitioner's son from sending a message to the petitioner. It was not till after the Bailiff and the decree-holder had left the place that the petitioner could be intimated of the incidents. The petitioner thereupon came to the Superintendent of the Court of Small Causes. He on hearing the petitioner searched for the papers and obtained the copy of the said order from the records. The clerk concerned expressed his regret stating that this was due to a bonafide mistake on his part. The Superintendent made arrangements for re-delivery of possession of the premises to the petitioner, to which the decree holder agreed. Possession was delivered to the defendant petitioner the same evening at 7 p.m.

From the allegations made in the petition it is manifest that the decree-holder's complicity in the affairs on the 6th of April is based upon the so called knowledge of the said decree-holder about the interim order issued by the Court. We have already referred to grounds for not accepting this part of the petitioner's case and the offence so far as the incident on the 6th of April, are concerned lose weight as regards the decree-holder. The decree-holder is not alleged to have taken part in any of the alleged acts by or at the instance of the Bailiff, opposite party. Paragraph 22 is the only paragraph in the petition on which the decree-holder is attempted to be implicated in this matter. The statements contained in paragraph 22 are not supported by any proper affidavit. They are stated to be merely submissions. A portion of this paragraph is argumentative in nature. The allegations are not

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proved by the affidavit filed. This rule must accordingly be discharged as against the decree-holder Joggeswar Banerjee.

We now take up the allegations made as against the Bailiff, Sailendra Nath Ganguly. In the affidavit filed by him he has totally denied the allegations against him. The denial covers each one of the allegations made. The Bailiff states that when he reached the premises in question he found the plaintiff to be present. The latter pointed out the portion of the premises in the occupation of the defendant judgment debtor. The Bailiff denies that the petitioner's son had intimated the fact that an injunction had been issued by the High Court or that he was requested to make enquiries about the same for verification. The defendant's son merely asked for a day's time on the ground that the judgment debtor was taken away in his office. The Bailiff expressed his inability to allow such time and requested him to vacate the premises. The Bailiff continues his version in the following terms:

"Whereupon the defendant's son, wife and other children peacefully vacated the said bed room and covered verandah with some of the defendant's articles from the said bed room. The rest of the articles from the said bed room, covered verandah, kitchen and store room were removed by the plaintiff's men peacefully."

The Bailiff further denied that he had either any of the persons mentioned in paragraph 13 of the petition and that six persons of the locality were present as alleged. He also denied having uttered the expressions quoted in clauses (a) to (k) of paragraph 8 or having thrown away the moveables directing them to be damaged or destroyed. In short his story is that the members of the defendants family peacefully vacated the premises. The Bailiff had not used any force for delivering possession and that there had been no altercation between the parties or any occasion for using the abusive language as imputed to him.

The Bailiff continues to state that after such peaceful delivery of possession he returned to the Court and was about to deliver back the writ as having been executed the passing clerk informed him about the interim order passed by the High Court and the mistake under which the writ had been issued previously. The defendant was present in court. The defendant himself with his lawyer and the Superintendent of

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the office of the Court accompanied the Bailiff to the premises in question in company with the plaintiff's lawyer. Possession was restored to the defendant with the consent of the plaintiff. He denied the allegations of conspiracy or having done any act or uttered any expression which called for action in the present proceedings for contempt.

The affidavits which have been filed on behalf of the petitioner in support of the allegations made against the Bailiff are sworn to by the defendant's son Sibapati; and from amongst the six persons mentioned as witnesses in the original petition, affidavits by three of them Alak K. Singha, Mukti Bhattacharya and Dulal Ch. Das. An affidavit has also been filed by one Biswanath Mitra who alleges to have been present but whose name was not specifically stated in the original petition.

Affidavits referred to above are in support of the allegations made that the members of the defendant's family were not willing to give up possession, have preferred the Bailiff to an order by the High Court and that the defendant's family were forcibly ejected from the rooms, the articles were thrown out and damaged. They further support the petitioner's story that the Bailiff had taken with him two persons as his assistants and two women. They also support the defendant's case about the contemptuous language referred to in paragraph 14 of the original petition.

Attempts were made to introduce references to interpellations by the members of the State Legislative Assembly and to certain other alleged incidents in respect of which allegations were made against this Bailiff, Sailendra Nath. We do not think that such references are either apposite or relevant for deciding the question now before us. The only question for consideration is as to what had happened on the 6th of April, 1955 at 16, Blacquire Sq., what part had been taken by the Bailiff opposite party and whether any of his acts are such as can be taken cognizance of as amounting to acts in contempt of court.

Which of the two divergent stories should be accepted? The Bailiff's story that there had been no incident whatsoever but after peaceful delivery of possession with the willing cooperation of the members of the family of the defendant

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cannot be accepted. The statement made by the petitioner supported by a number of neighbours who are independent and disinterested persons must be accepted. The Bailiff is making a definitely false statement in the affidavit sworn to by him. An argument on behalf of the Bailiff was that on the materials the defendants' story should be disbelieved. No attempt was made to explain away the expressions alleged to have been used as stated in the original petition. The expressions used referring to the High Court and the Chief Justice and to the Chief Judge, Court of Small Causes are definitely contemptuous so far as administration of justice is concerned and particularly this Court.

It was argued on behalf of the petitioner that the Bailiff had acted in contempt in

(1) not postponing delivery of possession even when he was told that the High Court had issued an interim injunction staying delivery of possession ;

(2) by using contemptuous language against the courts and this Court in particular ;

(3) by his illegal acts which were abuses of the process of the court which brought down the good name of administration of justice in the State.

As regards the first count we have to consider whether by the intimation given to the Bailiff by the members of the family of the defendant that an order restraining the plaintiff from proceeding with the execution had been issued by the High Court, what would be duty of Bailiff in such circumstances. The position is not free from difficulty. On the one hand, when an officer of the court like the Sheriff or the Bailiff proceeds to give effect to an order by the court it is open to him to restrain from giving effect to the same only on a statement being made by the person aggrieved that the operation of the order had been stayed? It is stated on behalf of the defendant that the incident took place within a very short distance of the court and during the court hours ; the Bailiff could and ought to have returned to the court to ascertain the correct position. This however is not the only and the proper test. The distance from the court or the feasibility of obtaining confirmation from the court cannot be the criterion for determining the conduct of the Bailiff or the Sheriff,

Such an incident may happen in the Mofussil far away from the court. Is the Bailiff to return the writ to the court only on a verbal statement by somebody on behalf of the aggrieved party that the writ was not to be enforced?

There are specific provisions in the rules of the Supreme Court of England (Or. 52, Rule 11 R.S.C.R.). When a Sheriff fails to return the writ of ejectment or bring in the body pursuant to notice he is himself liable to a committal.

The position may be different in different cases, but we are not expressing any final opinion on this point at this stage, that when a Sheriff or the Bailiff is shown an authenticated copy of an order suspending or proceeding with a writ it may be desirable for the Sheriff to come back. As there was no such occasion in the present case we need not dilate upon it any further.

We are not expressing any final opinion as to the duty and conduct of the Bailiff when confronted with the verbal statement of the affected party to refrain from executing a writ.

If the Bailiff however finds that there is opposition and resistence as is alleged on behalf of the defendant in the present case, if he considered that the opposition was such that possession could not be delivered without applying force, the rules of the court provide that the Bailiff has to return to the court for being armed with necessary powers and help. It is for this reason that the Bailiff has come out with the sotry which we have not accepted that peaceful possession had been delivered by him. The mistake on the part of the Bailiff in using force however without being properly armed by an order of the court does not make his offence a culpable one for contempt of court. Such an offence comes under a different category with which we are not concerned in the present proceedings.

We next consider whether the Bailiff had by his conduct and/or use of language been in contempt against the High Court or Courts in general. It is not possible to sub-divide the entire episode into a number of different incidents in order to determine whether each or some of his acts or the uttering the sentences did or did not constitute contempt of Court.

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If the Bailiff had even when informed of the interim order passed by this court merely expressed in a normal way that he was bound to carry out the directions contained in the Writ issued to him, no serious objection could have been taken to the same.

That the Bailiff himself is now alive to the seriousness of the situation is clear from the attempt made by him in the Affidavit sworn to in explanation of the rule issued by this Court—that there had been no incident whatsoever—no occasion for using force or to utter the words alleged or the general behaviour and conduct alleged.

On the findings reached by us there is no room for any doubt that the Bailiff was out to show his supreme authority which even when exercised illegally and improperly could not be set right by the competent court. He by his conduct and by the language used indicated his indifference and contempt of the judiciary and of this court in particular.

It would be an act within bounds for the Bailiff to have given expression in a formal manner without any warmth or the use of undignified and insolent language when he was bound to carry out the orders as contained in the writ. The entire episode and the atmosphere created have to be regarded as one incident and cannot be split up into component parts so that each remark may be explained.

Oswald has observed

"Contempt of court.....is so manifold in its aspects that it is difficult to lay down any exact definition of the offence. It is defined or described to be a disobedience of the court, an opposing or a despising, the authority, justice or dignity thereof. It commonly consists in a party's doing otherwise than he is enjoined to do, or in doing what he is commanded or required by the process, order or decree of the court.

Lord Hardwicke L. C. said—

"There are 3 different sorts of contempt. One kind of contempt is scandalising the court itself. There may be likewise a contempt of this Court, in abusing parties who are concerned in causes here. There may be also a contempt of this Court in prejudicing mankind against persons before the cause is heard." To speak generally, contempt of court may

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be said to be constituted by any conduct that tends to bring the authority and administration of the law into dis-respect or disregard, or to interfere with or prejudice parties, litigants or their witnesses during the litigation.

"Publishing improper attacks on Judges of superior courts and their jurors reflecting on their action in the administration of justice, attempting to intimidate or improperly influence judges, or speaking contemptuous words to or of judges of inferior courts when in the actual execution of their duty amounts to contempt of court."

The observations made by Wilmot C. J. in *Rex* v. *Almon* (1) pronounced in 1765 are still referred to as pregnant words attracted without any reference to any country or nationality.

"Attacks upon Judges excite in the minds of the people a general dissatisfaction of judicial determination and whenever men's allegiance to the laws was so fundamentally shaken, it is the most vital and dangerous obstruction of justice calling out for a more immediate redress than only obstruction; not for the sake of the judges as private individuals but because they are the channels by which the King's justice is conveyed to the people."

The prestige and the dignity of the Courts of law must be preserved. The confidence of the litigants should not be shaken by the use of contemptuous and scandalous expressions towards court or Judges attempting to belittle them. Stream of justice is not be polluted by shaking the confidence in the administration of justice by conduct exhibited and words used by the Bailiff in question.

The only way this can be dealt with is by finding him guilty of the offence and commit him to prison for two weeks and inflict a fine of Rs. 500/-. In default, he will be detained in prison for a further period of two weeks. The amount of fine may be paid either to the Superintendent of Jail where he will be kept in detention or to the Sheriff. The amount when paid is to be credited under the appropriate head in the account of State.

P. K. Sarkar, J.:—I agree.

The Bailiff found guilty of contempt of court and sentenced.

P. K. D.

(1) [1765] Wilm. 243.

ORIGINAL CIVIL

Before Mr. Justice P. B. Mukharji.

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January, 13.

RABINDRA NATH BANERJEE
V.
HARENDRA KUMAR CHAKRAVARTY*

Civil Procedure Code, Order XXI, rule 89, Sec. 64, Order XXI, rule 54—Transfer of Property Act, Sec. 54, Sec. 55(6) (b)—Whether a person, with whom the judgment-debtor entered into an agreement for sale of immovable property while the immovable property was under attachment, has locus standi to apply for setting aside of sale under Order XXI, rule 89, Civil Procedure Code?

On a construction of the language of Order XXI, Rule 89 Civil Procedure Code, the applicant must be a person who holds an interest in the property sold in execution and whose title has been acquired before such sale. The word "title" does not necessarily mean a complete and perfected title but also includes an inchoate title or a title in process of maturity. In the present case the applicant acquired an interest in the property sold in execution owing to the Judgment-debtor having entered into an agreement for sale with him on a date prior to the date of sale by the sheriff while the property was under attachment.

Under Section 54, Transfer of Property Act, a contract for the sale of immovable property does not of itself create an interest in or charge on the property. A contract for sale, however, does not stand by itself where there is a part payment of the purchase price or payment of what is called the earnest-money. In such event Section 55 (6) (b) of the Transfer Property Act is attracted and it will be treated as though the ownership of the property has passed and there is a charge for part of the purchase-money paid. The applicant having paid Rs. 5,001/- as earnest-money on the date of the agreement, which was prior to the date of the sale, the applicant under the agreement for sale acquired an interest in and even a charge on the property sold. That being so, the applicant has *locus standi* to make application under Order XXI, rule 89, Civil Procedure Code.

Attachment does not make a subsequent transfer void for all purposes but void only as against all claims under the attachment.

An Application on Chamber Summons for setting aside sale under Order XXI, rule 89, Civil Procedure Code.

* Original Side Application on Chamber Summons No. 2933 of 1953.

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The material facts will appear from the jugment.

Amiya K. Bose for the Applicant.

K. Ghosh in person.

A. K. Sen and *S. K. De* Attorneys for the other respondent.

The judgment of the Court was as follows:—

January, 18.

P. B. Mukharji, J.:—This is an application on chamber summons by Sunil Kumar Mukherjee of No. 4/5, Hem Kar Lane, Calcutta for an order setting aside the sale of premises Nos. 21/B and 31, Gokul Mitra Lane, Calcutta, held by the Sheriff on the 24th August, 1955 in execution of the decree passed in this suit.

The application is on summons to the plaintiff decree-holder the defendant judgment-debtor and the two purchasers. The plaintiff states that his decree has been satisfied by the applicant. The defendant has not appeared. Of the two purchasers one Ranjit Ghose appearing through an attorney has neither supported nor opposed this application and his only submission is that in case the Court set aside the sale he should be allowed to withdraw the deposit that he had made without a further application, a course to which there is no objection from any of the parties. The opposition is from the other purchaser Kanak Ghose who is himself an advocate of this Court and who has appeared in person.

The chamber summons was taken out on the 21st November, 1955 on the the reopening of the Court after the long vacation on which date the applicant obtained the following ex parte order:

> "Application noted as made today. Leave granted to the applicant to deposit Rs. 637-8-0 with the Registrar being the 5% of the purchase price for payment to the auction purchasers. The Registrar to act on a signed copy of the fiat. This order is without prejudice to any objection that may be taken later."

The summons was returnable on the 29th November, 1955,

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The facts of the case are few. The decree in this suit was made on the 28th April, 1954 directing the defendant to pay to the plaintiff the sum of Rs. 8,696/- with interest and three-fourths of the taxed costs. In execution of the decree the said premises were attached in 1954 and thereafter the Sheriff on the 24th August, 1955 sold the said premises. Respondents Ranjit Ghose and Kanak Shose became the highest bidders and purchasers respectively of 21/B, Gokul Mitra Lane for Rs. 2,200/- and 31, Gokul Mitra Lane for Rs. 10,550/-. The sale proclamation issued by the Sheriff shows that the amounts for which the sale was ordered were the sum of Rs. 8,696/- being the principal of the decree with interest and the sum of Rs. 1,371-12-9 being the three-fourths share of the taxed costs. The interest came up to Rs. 816-3-0 and the approximate costs of execution proceedings about Rs. 500/-.

On the 11th July, 1955 while the said premises were under attachment the judgment-debtor entered into an agreement for sale with the applicant in respect of No. 31, Gokul Mitra Lane. It is stated in the petition that the price fixed under that agreement for sale was Rs. 13,000/- and that Rs. 5,001/- was paid as earnest money on the 11th July, 1955. The sale by the Sheriff took place thereafter on the 24th August, 1955. Then what the applicant did was to pay to the defendant the said purchase price in two instalments one of Rs. 6,000/- on the 20th November, 1955 and the balance with interest and costs on the 21st November, 1955 being the date on which the present application was made.

The applicant's contention is that what remained to be paid thereafter was only the sum of Rs. 637-8-0 being 5% of the purchase price as solatium to the purchaser. It was this amount of money which was deposited in Court with the Registrar on the 21st November, 1955. The applicant submits that he is entitled to make this application and set aside the sale under the provisions of Order XXI Rule 89 of the Civil Procedure Code.

Two objections have been urged by the respondent purchaser, Kanak Ghose. The first objection is that the applicant has no locus standi to make this application. The second objection is that Order XXI Rule 89 has no application to the present case and therefore the application is incompetent.

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Taking up the first objection, the argument is that the applicant has no interest to set aside the sale. The language of Order XXI Rule 89 states that any person "holding an interest therein" (property sold in execution) "by virtue of a title acquired before such sale" may apply to have the sale set aside. On a construction of that language it is clear that the applicant must be a person, who answers two requisite qualifications. One is that he must be a person who holds "an interest" in the property sold in execution of the decree. The other is that his "title" must be such as was acquired before such sale. It is contended that the applicant does not satisfy these two qualifications.

If title is acquired by the full payment of the purchase price then it must be recalled that the payment of the purchase price in this case was not made complete until the 21st November, 1955 being a date after the sale had been held by the Sheriff on the 24th August, 1955. To that contention the answer is that the word "title" does not necessarily mean a complete and perfected title but also includes an inchoate title or a title in process of maturity. The argument on behalf of the applicant is that he acquired an interest in the property sold in the execution when he entered into an agreement for sale with the judgment-debtor on the 11th July, 1955 which was prior to the date of sale by the Sheriff.

In support of that contention the applicant's counsel relied on an unreported decision of Mukherjea and Sen JJ. *Dhirendra Nath Roy* v. *Messrs. Harsukdas Balkissendas* (1). In that decision Mukherjea J. is reported to have said "After all it is enough for the executing Court that there was prima facie an agreement for sale between the parties which was subsisting at the date of the contract which would give the appellant sufficient interest to protect the property by depositing the decretal dues."

My attention was also drawn to the case of *Gostha Behari Biswas* v. *Sankar Nath Mukherjee* (2) where a Division Bench of this Court came to the conclusion that a transferee from the judgment-debtor of immovable property

(1) Appeal from Order No. 256 of 1940 from the order of the Subordinate Judge of 24 Parganas in Title Execution Case No. 82 of 1939 decided by *Mukherjee & Sen JJ.*

(2) [1912] A.I.R. Calc. 281.

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attached in execution of a decree for money becomes the owner of the property and is competent to make an application under Rule 89 Order XXI of the Civil Procedure Code for cancellation of the sale in execution of the decree. The basis of that judgment is that the effect of section 64 of the Civil Procedure Code was not to invalidate, for all purposes, a transfer of property by the judgment-debtor after it had been attached in execution of a decree against him. The ratio of that decision is stated in these terms:— "We must hold accordingly that the transferee from the judgment-debtor after attachment became the owner of the property and undoubtedly acquired an interest therein within the meaning of Rule 89 and was competent to apply under that section."

Reliance was also placed on behalf of the applicant on a decision of the Patna High Court in *Mundrika Singh* v. *Nanda Lal Singh* (1) where Monoharlal, J. came to the conclusion that where attached property had been sold by auction and a third person within 30 days made an application under Order 21 Rule 89 of the Civil Procedure Code on the strength of a contract of sale executed in his favour by the judgment-debtor before the auction sale, he should be allowed to do so as he had *locus standi* to make the application under Order 21 Rule 89.

These decisions *prima-facie* support the applicant's contention that he is a person of sufficient interest within the meaning of Order 21 Rule 89 to make the present application.

But the difficulty with these decisions is that they do not go far enough in their analysis to show how such a conclusion is reached. I am of the opinion on the point of construction that the word "title" in Order 21 Rule 89 C.P.C. includes not merely completed and perfected title but a title in process of maturity. But even then the question remains, whether an agreement or a contract for sale creates an interest in the immovable property sold in execution after attachment. The mere right to sue for specific performance of a contract for sale may not be decisive, because it has been held that right to sue for specific performance is a personal right to call for execution of a conveyance and not itself an interest or charge on immovable property, although when the conveyance would be executed that would create interest and title in immovable property.

(1) [1941] A.I.R. Pat. 204.

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None of these decisions appears even to refer to the most relevant section which is section 54 of the Transfer of Property Act. That section provides *inter alia* "A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not of itself create any interest in or charge on such property." In other words, a contract for sale by itself does not create either an interest or a charge on the property. The language of Order 21 Rule 89 insists that the applicant must be a person holding "an interest" in the property sold in execution. The question therefore is, can it be said that the agreement for sale in this case on the 11th July, 1955 created an interest in the property?

The answer to this question depends on the nature of the agreement for sale in each case. The language of section 54 emphasises that "of itself" a contract for sale does not create any interest or charge on the property. But very often a contract for sale does not stand by itself where there is a part payment of the purchase price or payment of what is called the earnest money. In that event section 55(6) (b) of the Transfer of Property Act would be attracted and it will be treated as though the ownership of the property had passed and there is a charge for part of the purchase money paid. In this case the applicant paid Rs. 5,001/- as earnest money on 11th July, 1955, the date of the agreement, and this date was prior to the date of the sale which was the 24th August, 1955. That shows that such a purchaser under an agreement for sale has an interest and even a charge in the immovable property sold in execution. That being so I hold that he answers the requirements under order XXI Rule 89 of the Civil Priocedure Code of a person holding an interest in the property and having acquired a kind of title, may be only a charge, before the sale held by the Sheriff. Having regard to the fact that the applicant has in this case actually a charge for the earnest money in the property sold it becomes unnecessary to decide the debatable controversy appearing in *Baidyanath* v. *Radharani* (1), namely, whether the Calcutta amendment of Order 21 rule 89 C.P.C. by using the word "interest" and omitting the

(1) [1946] 50 C.W.N. 394 397 ( ).

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word "title" has so enlarged its meaning as to include pecuniary, or possessory or personal or other interest apart from proprietory interest. I therefore express no opinion on the Calcutta amendment on this point.

Another objection on this branch of the case was raised on the ground that the premises sold were under attachment at the time of the agreement for sale. It was contended that a private alienation of attached property was void under Sec. 64 of the Civil Procedure Code. This objection cannot be sustained because it fails to take note of the fact that attachment does not make a subsequent transfer void for all purposes but void only as against "all claims enforceable under the attachment." That is the express limitation provided in Sec. 64 C.P.C. Here in this case the transfer far from being against any claim enforceable under attachment goes to effectuate the very purpose of attachment, namely, payment of decree-holder's dues. Order 21 rule 54 C.P.C. prohibits the judgment-debtor from transferring or charging the attached property and all persons from taking any benefit from such transfer or charge. A breach of that prohibition does not render the transfer or charge void against the whole world but only against "claims enforceable under the attachment" as provided in Sec. 64 C.P.C. As the agreement for sale in this case has not defeated any claim under the attachment, I hold such agreement to be valid.

The next serious objection that this application is incompetent under Order XXI Rule 89 on the ground not that the applicant has no locus standi but that such an application is only permissible where both the deposits, one for the payment of solatium of 5% to the purchaser and the other for the payment to the decree-holder, are made in Court and not where the whole of the decretal amount has been paid outside the Court by means of a private arrangement between the judgment-debtor and the third party the applicant.

On a plain reading of the language of Order XXI Rule 89 of the Civil Procedure Code it is clear that such an applicant may apply to set aside the sale on his "depositing in court" (1) a sum equal to 5% of the purchase-money for payment to the purchaser and (2) the amount specified in the proclamation of sale less any amount which may, since the date of such pro-

clamation of sale, have been received by the decree-holder, for payment to such decree-holder. The words "depositing in Court" qualify both these sums. The question now is that where nothing remains due to the decree-holder can the benefit of this rule be had by the applicant by depositing only the 5% statutory compensation for the purchaser? In this view Order XXI Rule 89 is normally said to contemplate a case where some thing remains to be paid to the decree-holder and not the case where nothing remains to be paid to the decree-holder.

The Privy Council decision in *Seth Nanhelal* v. *Umrao Singh*, (1) is called in aid of this interpretation. That decision lays down the proposition that the Court has no jurisdiction to set aside a sale on an application by the decree-holder between the sale and its confirmation that a full adjustment of the decree arrived at between himself and the judgment debtor out of court may be recorded and certified. Sir George Lowndes delivering judgment of the Judicial Committee of the Privy Council at page 386 observed:—

> "The only means by which the judgment-debtor can get rid of a sale, which has been duly carried out, are those embodied in Rule 89, viz., by depositing in Court the amount for the recovery of which the property was sold, together with 5 per cent. on the purchase money, which goes to the purchaser as statutory compensation, and this remedy can only be pursued within 30 days of the sale under Art. 166 Schedule I of the Limitation Act, 1908."

That dictum appears to require deposit of both the sums in Court as an essential condition to attract Order XXI Rule 89.

Division Bench on the Civil Revisional Jurisdiction of this Court in *Jotish Chandra Gose* v. *Bireswar Halder* (2) decided that there was no authority for the proposition that in every case of an application under Order XXI Rule 89, Civil Procedure Code, for setting aside a sale, there should be a cash deposit in court of the amount specified in the sale problamation. This decision is also an authority on the point that payments to the decree-holder need not necessarily be made before the sale or through

(1) [1930] 35 C.W.N. 381.
(2) [1935] 39 C.W.N. 889.

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the Court. It was held there that the amount received by the decree-holder since the sale proclamation being deductible under Rule 89(1) (b) of Order XXI, such payments could be made after the sale proclamation and either before or after sale and if so made so that nothing remained due to the decree-holder, then the application, accompanied only by a Court deposit of the compensation money payable to the auction-purchaser was in order. So long as the Court was satisfied about the payment to the decree-holder and with respect to which payment the Court might accept the admission of the decree-holder it should rightly allow the application and set aside the sale.

The Privy Council decision was distinguished on very cogent grounds at page 832 by S. K. Ghose J. who delivered the judgment explaining the point of distinction at page 832 in these terms:—

> "There was no question as to whether any amount had been previously received by the decree-holder and so the latter provision 'less any amount which since the date of such proclamation have been received by the decree-holder' in clause (b), sub-rule (1), Rule 89, Order XXI was not considered at all."

In fact it is pointed out by S. K. Ghose J. that the Privy Council was concerned with a question of adjustment and certification under Order XXI Rule 2 but the payment of the amounts specified in the sale proclamation which is a necessary condition under Rule 89 of Order XXI was a different thing from payment and adjustment of a decretal amount out of Court, contemplated by Order XXI Rule 2, the latter coming at an anterior stage before the interests of a third party like the auction-purchaser intervened.

McNair, J. who was a party to that decision, subsequently sitting singly on the Original Side, expresses the same view in *National Insurance Company Limited* v. *Ezekiel Asron* (1) that the expression "received by the decree-holder" in Order 21 Rule 89 C.P.C. does not mean 'received through the Court.' The decision of another learned single Judge, Henderson, J. in revision in *Mahendra Chandra Das* v. *Parashmoni Dassya* (2) takes the same view.

(1) [1937] 41 C.W.N. 998.
(2) [1937] 68 C.L.J. 264.

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I respectfully agree with this view. It seems to me that both on technical grounds of construction as well as on the common sense view of the matter, this view is the sounder view. When the language of Order 21 Rule 89(1)(b) expressly mentions the words "less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder," then if the whole of the decretal money has been received by the decree-holder, the payment on this count becomes nil and deposit in court on that count need not be made any more. Technically and from the point of view of construction, the word "received" in Order 21 Rule 89(1)(b) is not limited by any qualification such as 'received through the Court' and I see no reason why the word "received" should be so limited when the Statute does not expressly say so. Also from the common sense point of view, after all what is this money intended for? It is intended for payment of the decree-holder's dues for which the property was being sold and if the decree-holder receives his money, whether through the Court or outside the Court, it satisfies the decree nevertheless and that being so, I do not see why in such a case there should be a ceremonious deposit of the decretal amount over again in Court in order to attract the provision of Order 21 Rule 89 C.P.C. After all, if the decree-holder has once received the money, he cannot receive it over again. The only point that the Court should be careful about in such cases is that it must have proof before it that the decree-holder has been fully satisfied. It is true that ordinarily an uncertified adjustment or payment can be recognised by an executing Court by reason of Order 21 Rule 2(3) of the Civil Procedure Code but that is when the contest is as between the decree-holder and the judgment-debtor or their respective representatives or assigns. But here the decree-holder is a party to the Summons and has appeared before me and has admitted through his Attorney that he has been fully paid and nothing remains due under the decree and the judgment-debtor does not contest this fact either or further the applicant himself says that he has paid this money in full satisfaction of the decree. I hereby record these admissions and am satisfied that such payment was made.

I am also satisfied in this case that there was no such delay

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as to hit this application by limitation. The sale was held on the 24th August, 1955. The limitation of 30 days for making the application expired on or about the 22nd September, 1955 which was during the long vacation of this Court. The present application for the deposit was made on the very re-opening day of this Court, on the 21st November, 1955, and it was expressly noted as having been made on that day.

For reasons stated in my judgment, I hold that, a person who had entered into an agreement of sale with the judgment-debtor of an immovable property already under attachment, and who had paid earnest money before any proclamation for sale, and who thereafter paid the balance of the purchase price to the judgment-debtor subsequent to the sale held under the proclamation, and with which money the judgment-debtor fully paid off the decree-holder at whose instance the sale under the proclamation was held, is a person competent to apply under Order 21 Rule 89 C.P.C. and that he is a person holding "interest" in such property by virtue of a title acquired before sale within the meaning of that provision. Secondly I hold that in such a case the applicant has to deposit in court only 5% of the purchase price as statutory compensation and the fact nothing is deposited in court for the decree-holder because the decree-holder had been paid off outside the Court does not make Order 21 Rule 89 C.P.C. inapplicable to such a case.

I, therefore, set aside the sale and make an order in terms of Clause (1) of the Summons.

By consent of parties, I permit the other purchaser Ranjit Ghosh to withdraw his deposit without a fresh application.

I direct that the applicant will pay the costs of this application to the respondent-purchaser Kanak Ghosh only. As the other respondent-purchaser Ranjit Ghosh is excused from making another application for withdrawal of his deposit, I make no order for costs in his favour in this application.

Sale set aside.

P. K. D.

APPELLATE CIVIL

Before the Chief Justice P. B. Chakravartti
and Mr. Justice S. C. Lahiri

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Workmen's Compensation Act, Sec. 3(b)(b), 19(1), 22 1), 28, 4(d) 6,7,17, Rule 48—Forms K, M and L—If the Act contemplates successive applications with respect to the same injury, when the injury results in temporary disablement and when the injury results in permanent disablement.

The question of law involved in this appeal : is Does the Workmen's Compensation Act contemplate successive applications with respect to the same injury or, to put it in more precise terms, when the compensation payable for a particular injury has been settled either by an award or by an agreement, can the workman concerned make a second application on the ground that the injury has since been aggravated and the disablement has increased and that consequently he is entitled to further compensation ?

The general provision relating to the employer's liability for compensation is contained in sec. 3 of the workmen's compensation Act. Two methods are prescribed by the Act for the assessment of compensation, one of them being the method of agreement and the other the method of award by a commissioner The Act does not directly say in any of its sections that the parties may settle the question about compensation by agreement, but there is an indirect reference to settlements by agreement in secs. 3(5)(b), 19(1) and 22(1) of the Act. There is another section relating to agreement, viz. Sec. 28 which provides for the registration of agreements and empowers the Registrar to refuse registration in certain cases.

Four kinds of disablement are known to the Workmen's Compensation Act, viz., (a) permanent disablement, total, (b) permanent disablement, partial (c) temporary disablement, total and (d) temporary disablement, partial.

* Appeal from Original order No. 186 of 1954 against the orders of Sri N. L. Shome, Commissioner for workmen's Compensation, West Bengal, in claim Case No. 302 of 1952 dated the 30.12.53 & 30.3.54.

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Whether compensation is fixed by an award or settled by an agreement such compensation shall be fixed and declared once and for all except in case of temporary disabilities, partial or total. A personal injury involving permanent disablement can be the subject matter of only a single adjudication. When the disablement is a permanent one at the date when the compensation is assessed, its entire range is before the parties and there can be no reason for future adjustment. When the Act has not provided for a reopening of the question of compensation with respect to cases of permanent disablement, no second application on the ground of aggravation of an injury or disablement is maintainable.

The case of temporary disablement, whether total or partial, is dealt with in clause (d) of Sec. 4 of the Act and it states that, for such disablement, a half monthly payment during the disablement or during the period of five years, which-ever is shorter, shall be made of sums computed in certain ways by reference to the monthly wages of the workman. These half monthly payments may be commuted under the provisions of Sec. 7 of the Act, either by agreement between the parties or by an order of the Commissioner. The payments prescribed by clause (d) of Sec. 4 are however mad variable by Sec. 6 which provides for a review of such payments. Sec. 6 makes an express provision for altering the amount once fixed as compensation on the ground of a subsequent change in the circumtances, but by the terms of the Sec. it is limited to half-monthly payments which are prescribed by the Act for only temporary disablement, partial or total. Besides Sec. 6, there is no other provision in the Act which empowers the parties to seek a reopening of the question of compensation whether fixed by an agreement or determined by an award.

Sec. 17 of the Act merely prevents a workman from contracting himself out of his righs and says that any agreement by which a workman relinquishes any right of compensation from the employer shall be null and void. The Section cannot and does not contemplate a right to further compensation arising in future out of a change in the workman's physical condition.

Forms K and M prescribed by Rule 48 of the Rules framed under the workmen's compensation Act are forms for the memoranda of agreements with respect to compensation for injury resulting in temporary disablement. Form K is applicable to cases of lump sum payment while form M is applicable to cases of half-monthly payments. Form L prescribed by above-mentioned Rule 48 is form for memorandum of agreement with reapect to compensation for injury resulting in permanent disablement. The argument on behalf of the respondent based on the forms does not however lend any assistance to the respondent. If the Act itself has not given a right such right cannot be created by forms prescribed by the rules.

As regards the agrument advanced on behalf of the respondent that, even if the Act does not expressly authorise a second application on the ground of an aggravation of the injury and increase of the disability, there is no bar which excludes such application. the answer is that an application for compensation under the Workmen's Compensation Act is not an application under the general law, but an application under a special statute. No application under a special statute can be made unless the right to make such application has been given by the special statute itself.

The Act does not in any view provide for a second application for further compensation on the ground of an aggravation of a permanent disability for which compensation has once been fixed and declared either by a settlement or by an award.

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Second application by a workman under Workmen's Compensation Act for further compensation on the ground of aggravation of disability.

The material facts will appear from the judgment.

Phanindra Kumar Sanyal for the appellant.

Nalini Kanta Mukherjee for the respondent.

The Judgment of the Court was as follows :—

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P. B. Chakravartti, C.J. :—Of the two grounds urged in this appeal, one is really a ground of fact, but the other raises what appears to be a question of first impression. It is this : Does the Workmen's Compensation Act contemplate successive applications with respect to the same injury or, to put it in more precise terms, when the compensation payable for a particular injury has been settled either by an award or by agreement, can the workman concerned make a second application on the ground that the injury has since been aggravated and the disablement has increased and that consequently he is entitled to further compensation ?

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The facts out of which this appeal has arisen are as follows : The respondent, Chouthi, was admittedly a workman employed under the appellant Company and admittedly on the 5th of January, 1951, he suffered a personal injury by accident in the course of and arising out of his employment. The accident was that, while on duty, he was knocked down by one of the railway engines of the employer-Company. The injuries suffered were of a ghastly character. They included a compound fracture of both the upper and the lower jaws, including the teeth and the nasal bones, injury to the skull and injury to the scalp, that to the scalp being so violent that the bone was broken to pieces and several of them, recrossed or not recrossed, had to be extracted by more than one operation. Strange as it might seem, the workman survived. After the accident, he was taken immediately to the company's own hospital and treated there till the 21st of February, 1951, when he was discharged. Thereafter, negotiations seemed to have been commenced between the parties as to fixing the compensation payable to the respondent by agreement and in the course of such negotiations he was examined by one Dr. Garrow who assessed his disability as permanent and as involving loss of 60% of his earning capacity. When the matter came up to the Commissioner under section 28 of the Act, he thought that, inview of the nature of the injuries, it was desirable that the workman should be examined by a Brain specialist. Accordingly, the respondent was examined by one Dr. Anklesaria, who is an F. R. C. S. of the London University and a brain-surgeon. Dr. Anklesaria examined the respondent and after doing so, confirmed the assessment of his disability as made by Dr. Garrow In the certificate granted by him on the 10th of July, 1951, he added that it would be advisable for the respondent to do only light work for the present, but after a period of about six months, he would be able to do ordinary work.

Both the general physician and the Brain specialist having assessed the respondent's disability as involving loss of

60% percent of his earning capacity, an agreement was entered into between him and his employers on the same basis and it was registered on the 18th of July, 1951. The compensation agreed to was Rs. 1512/- of which a portion having been received by the workman previously, the actual payment made after the registration of the agreement was Rs. 1357/- the basis on which the compensation was settled was that of a permanent partial disability.

It appears that after the execution of the agreement, the respondent rejoined his duties on the 25th of July, 1951 and was given light work. This must have been on the strength of the observation contained in the certificate granted by Dr. Anklesaria. The respondent continued to be in service till the 15th of August, 1951, but was apparently unable to carry on. He went on sick leave on the 16th August and remained on such leave till the 27th August following. On the 28th of August he resumed his duties, but apparently his physical condition was such or became such that further medical attention appeared to be necessary. Certain papers of the Company's own hospital show that the respondent went to the Outdoor Department of the hospital on the 22nd of October, 1951, and on the 29th Nov. following, he was advised an operation. A further operation was performed and a few more pieces of bone were taken out from his head. As far as one can see from the hospital papers, he continued to receive medical attention till the 6th of March, 1952.

In the meantime, on the 8th of December, 1951, another of the Company's doctors, one Dr. J. N. Datta, pronounced the respondent unfit for further service and thereupon he was discharged.

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It must have been about that time that the respondent began to think that the Compensation he had received was not adequate and that he was entitled to a further amount. There is on the record a certificate granted by Dr. Manmatha Nath Pal on the 17th March, 1952, as respects the nature of the injuries received by the respondent on the 5th January, 1951. What caused that certificate to be issued on the 17th of March, has not been made clear, but it is reasonable to presume that something made it necessary to ascertain and place on record the nature of the personal injuries suffered by the workman, as they were on the date of the accident.

On the 1st of May, 1952, the respondent made the application out of which the present appeal arises. In that application he recited the accident and also admitted that he had already received a sum of Rs. 1357/- under an agreement, but he went on to say that the disability had since been aggravated and, therefore, he was filing a fresh claim "for aggravation". The fresh claim was a claim for a lumpsum payment of Rs. 4200/- less Rs. 1357/- which he admitted to have received and, therefore, a net sum of Rs. 2,843/-. The amount was claimed on the basis that the monthly wages of the respondent had been Rs 100/-.

By their written statement field on the 2nd of July, 1952, the appellant Company denied that there had been any aggravation of the disability since the agreement. They also claimed that the respondent should be further examined by a doctor and that he should be directed to report to the company for the purpose of such examination. A further case made by the Company was that the respondent had suffered a permanent disablement resulting from the injury and compensation for that disablement had already been assessed at a loss of 60% per cent of the earning capacity by agreement between the parties and the respondent had

received payment of the compensation agreed to. Since, according to the Company, there had been no subsequent aggravation of the physical condition of the respondent, it was pleaded that he was not entitled to any further compensation. The average monthly wages of the respondent were stated to have been not Rs. 100 /- as claimed by the respondent, but only Rs. 58/8/1.

It is important to note that it was not one of the Company's contentions that even assuming that there had been a aggravation of the physical condition of the respondent and an increase of his disability, he was still not entitled under the Act to maintain a second application.

It appears that after the respondent's application had been filed, he was examined by two doctors. One of them was the same Dr. Anklesaria who examined him for the second time on the 25th of July, 1952. Earlier, on the 6th of June, 1952, the respondent was examined by a doctor of his own choice one Dr. Satinath Banerjee.

In his second certificate, Dr. Anklesaria stated that he found the respondent's condition to be exactly the same as it had been at the time of the first examination and that it had not deteriorated in any way. According to the doctor, the disablement was still such as entailed a loss of 60% of the respondent's earning capacity. The certificate states further that the respondent was fit for ordinary work. The complaints made by him were described as "absolutely inconsistent with neuralgical examination" and the respondent himself was described as "stubbonrly unco-operative."

Dr. Satinath Banerjee's certificate gave an account of the condition of respondent's body as found by him on clinical examination. The details are such as make ones flesh creep. According to the certificate, there was evidence of deterioration particulary of the head injuries and the then loss of earning

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capacity was permanent and total. The certificate noted that the patient could not open his mouthfully, nor speak well, nor chew his food well, that there was obstruction of the nostrils on account of the fracture of the nasal bone, that the patient suffered from insomonia and complained of headache and that even his gait had become disturbed and looked incordinated.

Both the doctors gave evidence in Court. Dr Satinath Banerjee frankly admitted that he had not been supplied with any material wherefrom he could gather what the condition of the respondent had been in July 1951. He however added that if in July 1951, he found the patient's condition to have been as it was then, he would have assessed the disability at 100 percent for the head injury alone. Dr. Anklesaria adhered to his opinion that the respondent had not sustained any permanent disability in excess of the 60 percent originally assessed and that there had been no aggravation or deterioration. While admitting that the respondent could not open his jaws fully nor talk nor eat properly, the doctor asserted that even then he could carry loads of the weight of two or two and a half maunds.

It is only necessary to refer to the medical opinion of another of the company's doctors, Dr. Manmatha Nath Pal, whom I have already mentioned. He said nothing with regard to the extent of the disability at the time of the original injury, although his certificate states what the injuries were. But he has stated that as regards the petitioner's unfitness for work on account of his head injury, he is of the same view as Dr. J. N. Datta expressed on the 8th of December, 1951. This opinion obviously relates to the respondent's physical condition on the date on which Dr. Datta gave his certificate.

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The learned commissioner considered the evidence of the doctors as also the documentary evidence placed before him and came to the conclusion that there had been an aggravation of the injuries, increasing the disability from loss of 60 percent of the earning capacity to 100 percent of such loss. Having come to that finding, the learned commissioner proceeded to make an award for Rs. 25,200/- less Rs. 1522/- already paid, that it is to say for further net amount of Rs. 1008/-. It is against that decision that the company have preferred the present appeal.

On behalf of the appellant two points were urged before us by Mr. Sanyal. He contended that there had been no aggravation at all of the injury suffered by the respondent and that he learned commissioner's finding to the contrary was based on no evidence or rather was against the tenor of the evidence before him. It was contended in the second place that even assuming that there had been an aggravation of the injury since the aggreement, the respondent was still not entitled in law to maintain a second application for further compensation.

It seems to me that the company's first contention is answered by the clear facts of the case. I shall refer presently to the very ingenious criticism made by Mr. Sanyal of the judgment of the learned commissioner but there are certain facts which stare one in the face and against which it is useless for the company to contend. The company, it should be remembered, are not saying that the compensation paid on the basis of a 60 percent loss of the earning capacity was inadequate. Their case is that the disability was correctly assessed and has remained at what it was at the time of the agreement. But leaving speculation aside, it is a fact that after the agreement had been executed, the respondent was allowed to rejoin service under the company and he in fact earned wages. It is thus clear that

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on the 25th of July, 1951, when he rejoined his duties after the accident, his earning capacity had not totally disappeared and the company treated him, and treated with him, on that basis. Subsequently, however, on 8th December, 1951, one of the doctors of the company come to form the opinion that the respondent had become unfit for further service and acting on that opinion, the company discharged the respondent. It is thus clear that it was only on 8th December 1951, that, according to the company's own doctors, the total disappearance of the respondents earning capacity first occurred.

The facts I have recited make it perfectly clear that there was in fact no total loss of the earning capacity by or immediately after the accident and the respondent earned wages from the company themselves. If to that one adds the further fact that on 8th December 1951, the company refused to keep the respondent any longer in their service on the ground that he was no longer fit, the conclusion becomes inevitable that some earning capacity remained in the respondent after the accident, his loss being at that time only 60 percent, and that the earning capacity so surviving the accident was lost by him on or about 8th December 1951, when he disability became total.

As Mr. Mukherjee, appearing for the respondent, reminded us, the disability contemplated by the Act was disability in relation to the earning capacity and the physical condition comes in only so far as the earning capacity is effected thereby. On the facts established by the company's own conduct as also by the evidence called by themselves, there can be no manner of doubt that the personal injury suffered by the respondent had, in fact, become aggravated after the date of the agreement and that the disability increased from 60 percent loss of the earning capacity to total loss.

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I would now refer to the ingenious criticisim advanced by Mr. Sanyal on behalf of the company. He contended that the evidence in his case consisted in the opinion of medical men and that it was quite possible that on precisely the same physical condition of a particular workman, one doctor would say that the loss of earning capacity should be assessed at 60 per cent and another would say that such loss should be assessed as total. Mr Sanyal's point was that, in the first place, what the doctors on whom the respondent was relying had said was that on 8th December 1951, or thereafter his condition was such that there was no longer any earning capacity left in him.

The assessment of the disability as on or about 10th July 1951, had been 60 per cent. But the same physical condition which had evoked the medical opinion expressed on 8th December 1951 or subsequently, might have existed in July 1951 and might have caused another doctor to say that the disability was only 60 per cent. Mr. Sanyal particularly reminded us that the respondent's own doctor had not seen him in July, 1951 and had not been supplied with materials about his physical condition at that time. The only doctor who had seen the respondent at both points of time was Dr. Anklesaria and his opinion was that the respondent's physical condition had not deteriorated.

I am not quite sure if Mr. Sanyal realised the effect of what he was saying. A contention that the respondent's physical condition had not deteriorated can have two meanings. One meaning would be that the physical condition had in fact remained the same and that the disability caused by such condition had been correctly assessed at the time the agreement had been entered into. The other meaning would be that the assessment of the disability was no true criterion of what the physical condition really was and it was quite possible that the same physical condition as seen subsequently,

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which, in fact, involved a total disability, had also existed at the earlier point of time, but the disability had then been assessed by another doctor or another agency at the lower percentage. Mere difference between the desability as assessed at different points of time by different doctors would not, therefore, be conclusive evidence that there had been any change of the physical condition. I have already disposed of the contention of Mr. Sanyal in the first of the two meanings I formulated. I have held that on the facts it was clear beyond any vestige of doubt that the physical condition of the respondent had not remained stationary but had deteriorated. In its second meaning, the contention of Mr. Sanyal seems to me the land his clients in serious difficulty. The company cannot throw overboard their own doctors' namely, Dr. Manmatha Nath Pal and Dr. J. N. Datta. Their opinion was that at least on the 8th of December, 1951, the respondent was not fit for service. If the company's contention be that the same might have been the condition of the respondent in July, 1951, although the disability was assessed at 60 per cent, then the position would be that there had been no adequate assessment of the disability and that the respondent, being entitled to compensation on the basis of a permanent and total disability, had yet accepted an agreement on a basis of permanent and partial disability. If such turned out to be the real state of the facts, it would become a serious question whether section 17 of the Act would not be attracted and whether the agreement would not have to be held to be void on the ground that the respondent had relinquished a part of his compensation. If Mr. Sanyal's client still wanted to contend that the second application would not lie, the contention would have to be not that a second application did not lie on the ground of aggravation of the original injury, but that it did not lie even to correct a mistake which had occurred in the assessment of the disability as it existed even at the date of the agreement. As I have pointed out, the plain case made

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before the Commissioner by the Company was that there had been no aggravation of the injury in fact, and the only legal argument urged before us was that no second application on the ground of aggravation was maintainable. The other possible contention which I mentioned just now, would not avail the Company in the least, because in the first place the case was never placed on that basis and in the second place it would bring the company face to face with section 17.

I have said so much only to dispose of the criticism made by Mr. Sanyal of the judgment of the learned Commissioner. Whatever else may be said of it, the learned Commissioner was certainly right in saying that the evidence of Mr. Anklesaria was contradicted by that of Dr. Manmatha Nath Pal. Dr. Anklesaria, speaking on the 25th July, 1952, said that the respondent's disability was still 60 per cent, but Dr. Manmatha Nath Pal, speaking as of the 8th of December, 1951, said that as to the respondent's condition even as on that date, he thought in agreement with Dr. J. N. Datta that the disability was total. I am accordingly of opinion that the first contention of Mr. Sanyal fails.

The second contention is a pure contention of law, having considered the sections of the Act, I have come to the reluctant and regretful conclusion that it must be accepted.

The general provision relating to the employer's liability for compensation is contained in section 3 of the Act. It says, that if personal injury is caused to a workman by accident arising out of and in the course of employment, his employer shall be liable to pay compensation in accordance with the provisions of Chapter II of the Act. Two methods are prescribed by the Act for the assessment of compensation, one of them being the method of agreement and the other the method of award by a commission. The Act does not

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directly say in any of its sections that the parties may settle the question about compensation by agreement, but there is an indirect referance to settlements by agreement in section 3(5)(b) of the Act and sections 19(1) and 22(1), both imply that recourse may be had to the method of an award by the Commissioner, only when the method or agreement has failed. The only other section relating to agreement is section 28 which provides for the registration of agreements and also empowers the Registrar to refuse registration in in certain cases But whether the compensation is fixed by an award or settled by ageement, is proved to have suffered personal injury by accident in circumstances contemplated by the Act, he will be entitled to compensation, but such compensation shall be fixed and declared once and for all except in case of temporary disabilities, partial or total. The procedure prescribed by the Act for making an application for compensation, the provision made for the serving of notices and the enumeration of the matters to be considered, all suggest that a personal injury involving permanent disablement can be the subject-matter of only a single adjudication. The provision for a review of the compensation is contained in section 6 of the Act, but before I refer to that section, it is necessary to refer to section 4. Section 4 is concerned with the amount of compensation and it lays down what the compensation shall respectively be for the four kinds of disablement know to Act, namely, permanent disablement, total, permanent disablement, partial; temporary disablement, total; and temporary disablement, partial. The case of temporary disablement, whether total or partial, is dealt with in clause D of the section and it states that, for such disablement, a half-monthly payment during the disablement or during the period of five years, whichever is shorter, shall be made of sums computed in certain ways by reference to the monthly wages of the workman. These half-monthly payments may be commuted under the provisions of section 7 of the Act, either by agreement between the parties or by an order of

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the Commissioner. The payments prescribed by clause D of section 4 are however made variable by section 6 which provides for a review of such payments. The section says that any half-monthly payment, whether payable under an agreement or under an order of a Commissioner, may be reviewed by the Commissioner, on the application of either party on the ground that there has been a change in the condition of the workman and then sub section (2) of the section provides that, on such review, a monthly payment may be continued or increased or decreased or ended, or if the accident is found to have resulted in a permanent disablement, it may be converted into a lumpsum. Section 6 thus makes an express provision for altering the amount once fixed as compensation on the ground of a subsequent change in the circumstances, but by the terms of the section it is limited to half-monthly payments which are prescribed by the Act for only temporary disablement, partial or total. Besides section 6, there is no other provision in the Act which empowers the parties to seek a reopening of the question of compensation, whether fixed by an agreement or determined by an award.

The reason why the Act has made an exception in the case of temporary disablement appears to me to be plain. The disablement being temporary, is normally bound or due to disappear, or it may be that it will grow worse and be aggravated into a permanent disability, but whether or not the subsequent development be for the better or for the worse, the disablement is, for the time being of a temporary character and since it is temporary, provision for future adjustment is obviously called for. Since the compensation is to be paid for the disablement, there will be no reason to pay it when the disablement has ceased or, again, since compensation is payable for the disablement as it is at the time the compensation is fixed, there is no reason why the full amount should continue to be paid, although the disablement diminishes and the earning capacity is corres-

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pondingly restored. Looking at the matter from the other point of view, since the compensation is originally assessed on the basis of a temporary disablement, there is no reason why the figure so assessed should be maintained, even if the disablement worsens and deteriorates into a permanent disability. The Act, therefore, for resons which it is not difficult to see, has made provision for subsequent adjustments on half-monthly payments, first assessed as compensation for a temporary disablement. The case of permanent disablement is plainly different. The disablement being already a permanent one at the date when the compensation is assessed, its entire range is before the parties and there can be no reason to make provision for future adjustment, at least in the case of total disablement. In the case of partial disalement as well, if it is of a permanent character, the assessment is made on the basis of the disablement as it is and on the further basis that it is permanent, namely, will remain what it is and, therefore, it becomes equally unnecessary to make provision for future adjustment. I have tried to give a reason for the distinction made by the Act between permanent and temporary disablements, but it is really not necessary to do so. If the Act has not provided for a reopening of the question of compensation with respect to cases of permanent disablement, no second application on the ground of aggravation of an injury or disablement can be maintainable, whatever reasons the Legislature might have had in making the distinction and irrespective of whether those reasons one good or bad

Mr Mukherjee who appears for the respondent invited us to hold on the basis of certain other sections that the Act did contemplate successive applications in cases where there was a progressive deterioration of the earning capacity. He referred in the first instance, to section 17 of which I am unable to see any relevancy. That section prevents a workman from contracting himself out of his rights and says that any agreement by which a workman relinquishes any right or

compensation from the employer shall be null and void. Obviously, the section contemplates relinquishment of such compensation as the workman is entitled to at the time, because unless there is a present right in him to claim such compensation, there can be no relinquishement of it. The section, therefore, cannot and does not contemplate a right to further compensation arising in future out of a change in the circumstances of the workman's physical condition. Section 17, therefore, seems to me to be nothing to Mr. Mukherjee's purpose. Equally in appropriate were his references to sections 19 and 22, because they only presuppose that prior recourse to a Commissioner for the purpose of obtaining an award, there must be an attempt at a settlement by agreement and that the application to the Commissioner for an award must state which of the matters in issue between the parties have been agreed to and which have not been. I am unable to see how either of those sections indicates that a second application on the ground of aggravation of the disability is maintainable. Mr. Mukherjee however, relied chiefly on the language of two of the forms prescribed by rule 48 of the Rules framed under the Act. Forms K and L. Form K is the form for the memorandum of agreement with respect of compensation for injury resulting in temporary disablement. Form L is the form for a similar memorendum of agreement relating to compensation for injury resulting in permenent disablement. Mr. Mukherjee pointed out that the compensation contemplated by form K was "in respect of all disablement of a temporary nature arising out of the said accident, whether now or hereafter to become manifest." In striking contrast, according to Mr. Mukherjee, was Form L which contemplated compensation "in respect of the disablement stated above and all disablement now manifest". The point in Mr Mukherjees contention was that since the words "hereafter to become manifest" did not occur in Form L which related to agreements as to compensation for permanents disablement, such agreements must be taken to be limited to disablement manifest at the time, but not extending to disablement which might become manifest in future. It was contended that in the case of a permenent disablement, disablement which might become manifest in future had been

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deliberately omitted from Form L and such omission implied that the agreement was not intended to cover further and future disablement for which the workman was left free to claim further compensation.

The argument of Mr. Mukherjee will not bear examination, but before I examine it, I should like to refer to the next form prescribed by the Rules form M. That form also is a form for a memorandum of agreement as to compensation for injury resulting in temporary disablement. But the distinction between Form K and Form M is that while Form K is applicable to cases of a lumpsum payment, Form M is applicable to cases of half monthly payment. The stipulation in Form M is as follows.

"This agreement is subject to the condition that the amount of the half monthly payments may be varied in accordance with the provisions of the said Act on account of an alteration in the earnings of the said workman during disablement. It is further stipulated that all rights of commutation under Sec. 7 of the said Act are uneffected by this agreement."

It appears to me that the true scope and intent of the three forms will appear more clearly, if we compare first form K and M. Form K settles the whole claim for injury resulting in temporary disablement by the receipt of a lumpsum amount. Naturally, such an agreement excludes future adjustments provided for in section 6 of the Act, but since future adjustments on account of a change in the circumstances are contemplate by the Act, it was necessary to say that the agreement was in full settlement of all and every claim in respect of disablement arising out of the accident, whether then manifest or whether it become manifest in future. A full settlement by the payment and receipt of a lumpsum naturally excludes a reopening of the question in future and it is necessary to include in such a settlement disablement which may become manifest in future, because, but for such inclusion in the agreement itself, future adjustment under section 6 of the Act would not be excluded and therefore the object of the settlement would fail. Far differ-

ent is the position under Form M. The agreement there contemplated is an agreement for the payment of half monthly payments and it expressly provides for variation in future as contemplated by section 6 as also commutation as contemplated by section 7 and the only matter agreed to which one can see is the matter of the amount of the monthly payment. Coming now to form L, it is true that it speaks of only "all disablement now manifest", but it was not necessary to say anything more or to refer to disablement "hereafter to become manifest", because in the case of permanent disablement, there is no section like section 6 and there is no possibility of future adjustments which require to be excluded by an express provision made in the agreement itself. The ommission of the words "hereafter to become manifest" in Form L does not, therefore, suggest that disablement which may become manifest in future is excluded from the purview of the agreement and it is left open to the workman to claim further compensation, in future, should such manifestations occur In my view, the forms relied on by Mr. Mukherjee do not lend him any assistance.

I have dealt textually with the textual argument of Mr. Mukherjee, based on the forms, but the short answer to his contention is that, if an Act itself has not given a right such right cannot be created by a form prescribed by the rules.

It was next contented by Mr Mukherjee that if the Act did not expressly authorise a second application on the ground of an aggravation of the injury and increase of the disability, there was at least no bar which excluded such application. The answer to that argument is that an application for compensation under the Workmen's Compensation Act is not an application under the general law, but an application a special statute. No application under a special statute can be made unless the right to make such an application has been given by such statute itself. The right under the Workmen's Compensation Act is not something like the common law right to damages. It is a creature of the Act itself and can be claimed only in the manner and to the extent that the Act prescribes and permits.

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It is not impossible that when a personal injury suffered by a workman is assessed for the purpose of compensation, some mistake should be made, nor is it impossible that even a permanent disablement, when it is partial, may deteriorate. In the case of permanent disablement of a total character, the question perhaps does not arise, because the limit has been reached and all the disabilities having occured, there is no further disability to occur in the future. But it is conceivable that in the case of a permanent disability of a partial character, there may be an aggravation. Why the Legislature has made no provision for such cases, it is not for us to say. It may have been thought that it would be quite impossible to work the Act if successive applications made at different points of time during the remainder of the workman's life were to be permitted and it was to be decided each time whether an aggravation had occured and if it had occured, whether it was an aggravation of the injury itself as such or whether the deterioration had been occasioned by the operation of external causes. We are, however, not concerned with questions of legislative policy and our sole function is to interpret the Act as we find it.

For the reasons I have given, the Act does not in any view provide for a second application for further compensation on the ground of an aggravation of a permanent disability for which compensation has once been fixed and declared, either by settlement or by an award. The second contention urged by Mr. Sanyal must, therefore, succeed.

In the result this appeal is allowed, the Judgment and order of the learned Commissioner are set aside and the application made by the respondent is dismissed. Since however, the point on which the appeal succeeds was not taken in the Court below, the appellants well not be entitled to any costs We further think that since, if this point had been taken in proper time, the further proceedings by way of an appeal might not have taken place and the respondent may have been involved in these proceedings by the omission of the appellants to take the point he should not be asked to refund the sum of Rs. 200/- which he has already withdrawn by our order, passed on the 22nd July 1954 in the connected Rule. To that decision Mr, Sanyal agrees and he says that there is no chance of recovering it from the respondent in any event,

In the result, the appeal is allowed but without costs and subject to the condition that the respondent shall not be required to refund the sum of Rs 200/- withdrawn by him by our order dated the 22nd of July, 1954.

Lahiri, J :—

I agree,

P.K.D.

Appeal allowed

ORIGINAL CIVIL

Before Mr. Justice G. K Mitter

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August, 12

NEW CHURULIA COAL CO. LTD.

v.

UNION OF INDIA.*

The Government of India Act, 1935, Sec. 175(3)—The Constitution of India, Art 299(1)—Indian Contract Act, Sec. 65—Whether cause of action under Sec. 65 of Indian Contract Act can exist side by side with cause of action under the Contract itself—What the plaintiff must prove in order to get relief under Sec, 65—Civil Procedure Code, Sec, 80—Entertaining a case not to be found in pleadings deprecated.

Art 299(1) of the Constitution of India is in terms practically identical with Sec. 175(3) of the Government of India Act 1935. So far as the Calcutta High Court is concerned, it has come to be accepted almost universally that an agreement, to which the Union of India is alleged to be a party, is void if it does not comply with the requirements of Sec. 175(3) of the Government of India Act, 1935.

The question next arises as to whether the plaintiff company can be given relief under the provisions of Sec. 65 of the Indian Contract Act. The plaint was on the footing that there was a good and valid contract between the parties and that the defendant had committed breach thereof. The defendant was asked to refund the purchase price and expenses incurred. The plea under Sec. 65 of the Indian Contract Act, now put forward, is wholly inconsistent with the above case made in the plaint. The right claimed under the contract disappears. The two rights cannot co-exist. The obligation to pay compensation or to restore the benefit received under a void contract is completady different from that under the agreement itself. The cause of action under Sec. 65 cannot exist side by side with the cause of action under the contract itself.

Entertaining a case not to be found in the pleadings is a procedure which the Judicial Committee has strongly deprecated in many cases. In this case no application was made for leave to amend the plaint. It was probably not done deliberately in order to avoid the objection which might be taken by the defendant on the ground of Sec. 80 of Civil Procedure Code. But Sec. 80 is explicit and mandatory and admits of no limitations or

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exceptions. The plaintiff company, therefore, cannot excuse itself for not having served notice under Sec. 80 with respect to the new and altered cause of action under Sec. 65 of the Indian Contract Act.

The trial of the issue as to whether relief can be given under Sec. 65 of the Indian Contract Act necessarily involves a trial of the questions of fact as to when the agreement was discovered to be void, who made the discovery and how the discovery was made. All these elements about the discovery, are singularly lacking in the testimony of plaintiff's witness in this case. If, nevertheless, the testimony could be accepted and it could be held on the basis thereof that the agreement was discovered to be void on the date mentioned by the witness, a new cause of action ought to be deemed to have arisen to the plaintiff on that date and this new cause of action ought to from the subject-matter of a separate proceeding.

The date of discovery of an agreement being void is material for the purpose of computation of the period of limitation In the absence of special circumstances, the date of the agreement itself ought to be regarded as the date when the agreement is discovered to be void.

Suit for compensation for breach of contract and in the alternative for restoration of advantages received under an agreement discovered to be void.

The material facts will appear from the Judgment.

Subimal Roy with Amiya Basu for the Plaintiff.

G. P. Kar, Senior Central Govt. Counsel, with S. P. Mitter, Junior Central Govt. Counsel for the Defendant, Union of India.

The judgment of the Court was as follows :—

August, 12

G. K. MITTER J. : This is a suit for recovery of a sum of Rs. 35,509-12-, alternatively for an enquiry into damages suffered by the plaintiff, for interest and costs.

The plaintiff is a Company with its registered office at No. 8, Lyons Range, Calcutta, in the year 1946 it was in need of boilers which were then very much in short supply. In order to help Colliery companies and others who were in need of boilers the Government of India started importing

second hand boilers from the United Kingdom and alloting them to such persons. One such boiler being a Lankashire boiler was alloted to the plaintiff. On arrival in India and delivery to the plaintiff the boiler was found defective. Repairs were undertaken and effected on it. The plaintiff's case is that even with the repairs the boiler is not what it had contracted for. According to the plaintiff the defendant had undertaken to supply a boiler with a working pressure of 150 lbs per square inch but even after the repairs the boiler was found to be incapable of developing more than a pressure of 109 lbs per square inch and it was not therefore what the plaintiff had burgained for, being wholly unfit for the plaintiff's use. The plaintiff called upon the defendant to take the boiler back and refund the money paid but this the defendant refused to do. Hence this suit.

The plaint proceeds on the basis that there was a contract between the parties entered into by the plaintiff through its Managing Agents Messrs. Business Development Ltd. of No. 8, Lyons Range, Calcutta and by the defendant through the Assistant Coal Commissioner (HQ), Department of Industries and Supplies, Government of India of No. 1 Council House Street, Calcutta. The plaintiff alleges that the defendant's said officer was duly authorised to act on its behalf and in fact had so acted in the matter of the agreement to sell to the plaintiff a second hand Lankashire boiler by John Thompson 30' x 9'-3' dish ended type, working pressure 150 lbs. per square inch, manufactured in the year 1920, complete with fittings, mounting and firebars as per description contained in the specification given in the letter of the Assistant Coal Commissioner dated the 18th January, 1946. The plaintiff's case is that the bargain was entered into on the basis of representations and terms contained therein. The plaintiff alleges that at the time of placing the orders it informed the Assistant Coal Commissioner that the boiler was required for the purpose of being installed in its Churulia Colliery. The price fixed was Rs. 34,000/- and was in terms of the plaint paid to the defendant by a cheque drawn in favour of the Controller of Coal Accounts. In May 1946 the plaintiff

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obtained delivery of a Lankashire boiler which was found damaged in parts and was submitted for test by the Chief Inspector of Boilers, Bengal. Certain repairs thereto were advised by the said Inspector of Boilers. For some months there was correspondence between the parties as to whether any, and if so, what repairs should be effected and on the 27th March 1947 the Assistant Coal Commissioner suggested certain repairs to be carried out, the cost thereof to be borne by the parties in certain proportions These repairs appear to have taken a long time. Even thereafter the boiler according to the plaintiff could only develop a pressure of 109 lbs. per square inch. The plaintiff alleges that on the 5th July 1949 it informed the Assistant Coal Commissioner that it had rejected the said boiler and called upon him to take the same back and refund the price paid. Particulars of the plaintiff's claim are given in paragraph 13 of the plaint which includes Rs. 34,000/- being the price of the said boiler, Rs. 64-11- being the Railway freight paid by the plaintiff, Rs. 325-1- being the handling and unloading charges and Rs. 820/- being the cost of repairs.

According to the plaint the cause of action for this suit arose in or about June 1949 when failure of consideration occurred by reason of the boiler being certified to have a working pressure of 109 lbs per square inch only necessitating the rejection of a boiler. By letter dated the 8th September 1949 the plaintiff caused notice to be served on the defendant under section 80 of the Code of Civil Procedure and instituted this suit on the 7th February 1950.

The first point taken in the written statement is that the contract referred to in the plaint did not comply with the provisions of sec. 175(3) of the Government of India Act 1935, and as such was void and unenforceable. Without waiving the said defence the defendant further contends that the working pressure of 150 lbs. per sq. inch mentioned in the letter of the 18th January 1946 was according to the test certificate of Vulcan Boiler and General Insurance Co. Ltd. and that the defendant had never given any guarantee or

entered into any condition that the said pressure would be sanctioned under the Indian Boiler Regulations. The further defence taken is that the greater part of the damage if any, to the boiler had occured in rail transit from Calcutta to the destination station Churulia and as such the defendant was not liable for the same. The defendant further denies the right of the plaintiff to return the boiler or to ask for refund of the price, freight and handling charges. It is submitted that there was no failure of consideration in about June 1949 or at any other date and it is also contended that the right, if any, of the plaintiff to reject the boiler came to an end in June 1946, i.e. within a reasonable time after the delivery of the boiler to the plaintiff in May 1946.

A brief containing all documents disclosed by both the parties was prepared for the use of this Court by consent of Counsel on both sides only the common documents therein were marked as exhibits. The first of such documents is a circular letter dated the 18th January, 1946 issued over the signature of the Assistant Coal Commissioner, stating that negotiations to procure a limited number of second hand Lancashire boilers from the United Kingdom had been concluded and definite news regarding the shipment of the boilers had been obtained. It was also mentioned that the boilers had all been thoroughly overhauled and tested and a list of the boilers with details of each type and price was given as annexure to the letter. The specification given at the foot of the letter is as follows :—

"3 Lancashire boilers by John Thompson 30' x 9'-3" dish ended type, working pressure 150 lbs. per sq. inch date of manufacture 1920, complete with fittings, mounting and firebars." After some correspondence which do not form part of the admitted brief there is a letter dated the 9th April 1946 written by the Assistant Coal Commissioner to the plaintiff's Managing Agents informing them that a second hand Lancashire boiler which was coming from the U. K. had been allotted to the addressee for installation at Churulia

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Colliery and the approximate price thereof was Rs. 34,000/-. The addressee was further required to send a cheque for the amount made out in favour of the Controller of Coal accounts. Plaintiff's letter dated the 25th April 1946 shows that the cheque was sent to Assistant Coal Commissioner on that day. The railway receipt of the consignment was sent by the Coal Commissioner to the plaintiff's Managing Agents as an enclosure to the letter of the 27th May 1946. Thereafter the boiler was taken delivery of by the plaintiff and certain defects detected. On the 20th February 1947 the plaintiff wrote to the Assistant Coal Commissioner enclosing copies of reports on the boiler from the Chief Inspector of Boilers, Bengal, and according to the plaintiff, this showed the unserviceable condition of the boiler. The plaintiff complained that it would be something dependable but as the Chief Inspector of Boilers did not approve of it the plaintiff was forced to call upon the Assistant Coal Commissioner to arrange to take back and refund the value with freight and handling charges. By letter dated the 21st. February 1947 the Assistant Coal Commissioner suggested that the repairs mentioned by the Boiler Inspector should be carried out so that the boiler could be put into commission. According to the writer the damage to the boiler had occurred in transit from Calcutta and Government was not liable therefor. This was replied to by the plaintiff on the 6th March 1947 to the effect that according to the experts the damage to the boiler was extensive and repair work would be very diffucult and in the circumstances the defendant should give instructions for disposal of the boiler. On the 27th March 1947 the Assistant Coal Commissioner wrote to the plaintiff that the question of returning the boiler did not arise at that stage as it was probably possible to have it repaired satisfactorily. It was mentioned in that letter that the damage to the boiler was of two-fold nature (1) damage due to the cracks and broken rivets and (2) damage caused by the cuckled front and plate. It was suggested that the damage of the first kind should have been repaired before the boiler was shipped but that the other damage must have been caused in transit after

the goods had been put on rail at the docks. To quote the words of the Assistant Coal Commissioner : "The terms of sale were F.O.R. Calcutta and, therefore any repairs necessary to repair the buckled end plate would have to be on your account. On the other hand Government is prepared to pay for the repairs which should have been carried out in the U.K. including the scraping and cleaning of boiler, necessary to ascertain the full extent of the damage". The writer therefore propose to approach the Boiler Inspector to arrange to have the boiler thoroughly repaired and put into two parts one on account of repairs which should have been carried out in the U.K. and the other on account of damage which had occurred in transit from Calcutta, which would be on the plaintiff's account. By letter dated 30th September 1947 the Assistant Coal Commissioner enquired of the plaintiff again as to whether the proposal mentioned in the letter of the 27th March 1947 was acceptable to the plaintiff. In reply dated the 5th April 1948 the plaintiff stated that since it required the boiler very badly it had no choice but to agree to the said proposal.

Thereafter some repairs were undertaken and on 5th July 1949 the plaintiff wrote to the Assistant Coal Commissioner again, stating that according to the decision of the Boiler Inspector, the boiler had not the working pressure of 150 lbs. per square inch as was represented by the defendants' letter of the 18th January 1946 and on the basis of which representation the plaintiff had purchased it. The plaintiff added "As the boiler has not the capacity of 150 lbs. per sq. inch it is unfit for use in our colliery", and further mentioned that the boiler would not serve the purpose for which it had been bought and therefore the addressee should take the boiler back and refund the money paid by the plaintiff. To this there was no satisfactory reply from the said Assistant Coal Commissioner and the plaintiff caused M/S Mitra & Mitra their Attorneys to address a letter to the Secretary, Department of Industries & Supplies, Government of India, New Delhi, setting out all the material facts and stating that the plaintiff intended to file a suit against the Government of India for recovery of the sums already mentioned.

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Mr. Kar, learned Counsel appering for the defendant was so sanguine that the plaint could be thrown out on the ground that that there was no subsisting contract between the parties, that he was content to raise the issue only, viz. whether the contract pleaded in paragraph 1 of the plaint was enforceable in view of the provisions of section 175(3) of the Govt. of India Act. Probably realising the indisputability of Mr. Kar's contention Mr. Roy, Counsel for the plaintiff said that he would raise a second issue as to whether the plaintiff was entitled to recover the amount claimed in the plaint under the provisions of sec. 65 of the Indian Contract Act. Mr. Kar strongly objected to this issue being raised and he argued that there was no foundation for it in the plaint and morever the issue involved determination of question of fact which the defendant had not had an opportunity of meeting. In as much, however, as it appears from more than one decided case that this issue was allowed to be raised even without a specific pleading and a decree passed in favour of the the plaintiff I said that after hearing arguments I would consider whether relief could be given to Mr. Roy's client on that plea. On that basis counsel were required to address me on the two following issues ?

(1) Is the contract pleaded in para 1 of the plaint enforceable in view of the provisions of section 175 (3) of the Govt. of India Act ?

(2) Is the plaintiff entitled to recover the amount claimed in the plaint under the provisions of sec. 65 of the Indian Contract Act.

The plaintiff examined one Taradas Bhattacharjee who described himself as an Accountant of the New Churulia Coal Co. Ltd. He said that he had been in the employ of the company since the year 1844. Only 9 questions were put to him in examination-in-chief and he was not cross-examined because counsel for the defendant objected to the evidence being given. The material questions and answers there to this witness are as follows.

Q. 5. Look at paragraph 1 of the plaint. In this paragraph a contract has been alleged between the plaintiff and the defendant.
.....Yes.

Q. 6. Did you or your firm ever know before the institution of the suit whether this contract waa valid or void?—We never knew that the contract was void.

Q. 7. After the institution of the suit did you or your firm ever come to know that the contract was void? Although it was stated in the written statement that the contract is void we did not accept that as correct but from hearing the proceedings of the case on the 28th of April last it occurred to us that the contract is void.

Q. 8. (Put by the Court). What is your understanding now? Is the contract void or not void?—It occurred to us that the contract is void.

Q. 9. What is your understanding now—the contract is void?—Yes it occurs to me now that the contract stands to be void. There can be no doubt that there was an agreement arrived at between the plaintiff on the one hand and the Assistant Coal Commissioner of the Department of Industries and Supplies, Government of India on the other about the purchase and sale of a second hand Lancashire boiler. The question is whether this agreement is one enforceable at law as against the Government or whether it is not so enforceable. If the answer to this question be in the affirmative there is a binding contract between the parties; if the answer be in the negative, it must, in my opinion, be held to be void.

In recent pronouncements of this Court it has been held that an agreement of this kind which does not comply with the requirements of sec. 175 (3) of the Government of

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India Act, is void. The reported cases on this point are, among others, *The Provinces of Bengal* v. *S. L. Puri* (1) and *Ram Nagina Singh* v. *Union of India* (2)

In the second case decided by the late Sinha J, the latter had been argued in great detail and the learned Judge came to the conclusion that the contract was void. The finding of the learned Judge was not assailed in appeal, the judgment of the appeal court being reported in *Union of India* v. *Ram Nagina Singh* (3)

So far as this Court is concerned it has come to be accepted almost universally that an agreement to which the Union of India is alleged to be a party, is void if it does not comply with the requirements of sec. 175 (3) of the Government of India Act 1935. Reference in this connection may be made to the judgments of Sarkar J. in *Sildi & Co.* v. *Governor General of India* (4) in *Associated Live Stock Farm (India) Ltd.* v. *Governor General of India* in Council, (5) in *Deokarandas Pravudayal* v. *Union of India* (6) and the judgment of the Appeal Court delivered by Chakravartti C.J. and S. R. Das Gupta J. in *Associated Live Stock Farm (India) Ltd.* v. *Governor General in Council* (7).

Certain observations contained in a recent judgment of the Supreme Court, i.e. in *Chatturbhuj Vithaldas Josani* v. *Moreshwar Parasharam & ors.* (8) to which reference is frequently made are apt to be misconstrued. The question there was whether the election of a particular person was void inasmuch as it was allaged that he was a partner of Moolji Sicka & Co. a firm which had outstanding contracts for the supply of *Bidis* to the Union of India. The Supreme Court came to the conclusion that certain contracts were subsisting on 15. 11. 1951

(1) ( ) 51 C. W. N. 713
(2) (1949) 84 C. L. J. 275.
(3) (1951) 89 C. L. J 342
(4) Suit No 1704 of 1946.
(5) Suit No. 1084 of 1946.
(6) Suit No. 1972 of 1946.
(7) Appeal No. 93 of 1951.
(8) [1954] S. C. A. 373

between Moolji Sicka & Co. and the Union of India. Article 299 (1) of the Constitution of India, which formed the subject matter of discussion in that case, is in terms practically identical with section 175 (3) of the Government of India Act 1935. Referring to the common practice of Government officers all over the country entering into a variety of contracts, often of a petty nature, almost daily, the Supreme Court observed : It may be that Government will not be bound by the contract in that case, but that is a very different thing from saying that the contracts as such are void and of no effect ; there being nothing to prevent ratification, if it was for the benefit of Govt. Govt. was not a party to that appeal and consequently the attitude of Government towards the contracts referred to, was unknown. There was no knowing as to whether Government would ratify the contracts or would contend that they were unenforceable. But in the present case there is no question of ratification because the Government expressly disclaims that there was any contract between the parties. In my view, the agreement in this suit, not being in the form prescribed by sec. 175 (3) of the Government of India Act, must be declared to be unenforceable in law with the necessary consequence that under the provisions of section 2 (g) of the Indian Contract Act it must also be declared to be void.

The question then remains as to whether it can be given relief under the provisions of section 65 of the Indian Contract Act. Section 65 provides :—

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

Before the court can grant relief under sec. 65, it has to arrive at a finding about the time when the agreement was discovered to be void, if that be in issue between the parties

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and also to determine what are the advantages which a party has received which it must restore or for which it must restore or for which it must pay compensation. When the party from whom redress is sought is a State Govt. or the Central Govt. there is an additional obstacle created by sec. 80 of the Code of Civil Procedure.

The trial of the issue as to whether relief can be given under sec. 65 necessarily involves a trial of at least two questions of fact. So far as my experience on the Original side goes an issue of fact is never allowed to be raised unless it is to be found in the pleadings. Mr. Roy drew my attention to the provision of 0.14 R. 3. of the Code of Civil Procedure and argued that it was open to the court to raise issues from sources other than pleadings. In *Babu Raja Mohan Manucha* v *Babu Manzur Ahmed Khan* (1) their Lordships of the Judicial Committee allowed the question to be canvassed before them although the Chief Court of Lucknow had refused to entertain it.

Turning to the facts of this case I think it would be wholly undesirable to allow the plaintiff to raise an issue of this kind on the pleadings before me. There is no allegation in the plaint about the agreement having at any time been discovered to be void. Although the point was expressly taken in the written statements no application was made for amendment of the plaint. The only evidence relating to the discovery of the void nature of the agreement, is to be found in the oral testimony of Taradas Bhattacharja which has been set out practically in extenso. It is strange that no director of the company or of the Managing Agents thought fit to adduce evidence to the effect but it was left to a subordinate officer like an accountant to come and testify to that fact. According to Bhattacharja it occurred to him at the hearing of the trial that the agreement was void although he was aware that the point had been taken in the

(1) (1942) L. R. 70 I. A. 1.

written statement. The witness never used the word 'occur' in his evidence. Even then I think it does not help the plaintiff. The evidence is of a most unsatisfactory character. If the directors of the plaintiff company were at all vigilant they should have found out immediately on perusal of the written statement that the defendant was challenging the existence of the contract itself. If there was a misunderstanding or misapprehension in the minds of the directors of the plaintiff company at any time before the institution of the suit there should have been no difficulty in their appreciating the correct position after a perusal of the written statement. Bhattacharya did not state as to what had come out at the trial of the suit on the 28th April 1955 which led to the discovery of the void nature of the agreement. He did not even suggest that he had come to discover this fact from the respective contentions of the learned counsel appearing on both sides. On the 28th April a question arose as to whether this issue on sec. 65 could be allowed to be raised at all. Discovery is a question of fact and like other issues of fact it involves a finding as to when it was made, who made it and how it was made. All these elements about the discovery of the nature of the agreement are singularly lacking in the testimony of Taradas Bhattacharya. On this evidence I feel that the court ought not be asked to hold that the agreement was discovered to be void on the date mentioned by this witness and if I was called upon to record a finding as to whether the agreement was discovered to be void on the 28th April I should certainly refuse to do so.

The date of the discovery becomes material for the purpose of computation of the period of limitation. It is now settled that, in the absence of special circumstances, the date when the agreement is discovered to be void, is the date of the agreement itself, *Hansraj Gupta* v. *Official Liquidators of the Dehra Dun Mussoorie Electric Tramways Co., Ltd.* (1)

(1) (1932) L. R. 60 I. A. 13

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It may be urged that there are special circumstances in this case in view of the fact that from 1946 to 1949 the parties had gone on tretting as if there was a valid and subsisting contract between them. It is possible that it had never occurred to the directors of the plaintiff company that the existence of the contract might be challenged by the defendant but there is no evidence of any special circumstances in this case which prevented such discovery being made at a date earlier than 28th April 1955.

The plaint is on the footing that there was a good and valid contract between the parties and that the defendant committed breach thereof by supplying a boiler which did not correspond with the description of that which was ordered. The defendant is asked to refund the purchase price and expenses incurred. The plea now put forward is wholly inconsistent with the above. According the to judgment of the Judicial committee in *Raja Mohan Manucha's case* (1) "The principle underlying s. 65 is thet a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation". Referring to the right of the appellants their Lordships observed that "they cannot have at one and the same time a right to insist that they have a valid subsisting special contract governing the transaction of loan entitling them to a specific rate of interest and the right to say that their money was advanced under a void agreement". The right under sec. 65 can only arise when the right claimed under the contract disappears. The two cannot co-exist. This is borne out by the judgment of Lord Hobhouse in the first leeding case on this point in *Musamat Basso Kuar & ors.* v. *Lala Dhum Singh.* (2) The facts of this case as given at page 216 of the report are as follows "Barumal and Dhum Singh were bankers in Saharanpur. They had dealings together as a result whereof Dhum Singh were bankers who came to owe Barumal a sum of Rs. 33359/3/6. It has then agreed between them that Dhum Singh should trans-

(1) (1942) L. R. 70 I. A. 1.
(2) (1888) L. R. 15 I. A. 211

fer to Barumal or to his wife Basso Kuar, certain villages for the sum of Rs. 55000/- and that his debt should be set off against the price. Dhum Singh executed a deed by which he acknowledged the receipt of the whole purchase money and conveyed the villages to Basso Kuar, and he endorsed on the deed a memorandum showing the balance only of the price, after allowing for the debt, was paid up cash. No money was actually paid".

"Barumal took away the deed and signed a letter prepared by Dhum Singh, in which he agreed to register the deed and to pay the balance of the price. But very soon afterwards he found, or alleged, that the deed was not in accordance with certain conditions for which he had stiputated and deelining to complete the purchase, he demanded what was owing to him. Dhum Singh on his part insisted that the deed was in accordance with the contract, and after an attempt at arbitration had failed, he brought a suit on the 3rd of August, 1880 against Barumal an Basso Kuar for specific performance of the contract praying for the registration of the deed and for an order on Barumal to pay the balance of Rs. 55,000/- less Rs 35,359/3/6 with interest". The subordinate Judge decided in favour of Dhum Singh and gave him a decree. But on appeal the suit was dismissed.

Thereupon Barumal renewed his demands for the payment of his debt, and not being able to get it he in conjunction with his wife Basso, instituted a suit on the 10th of September 1884 alleging in the plaint that Dhum Singh had taken steps contrary to the engagement between the parties and that the contract set up by Dhum Singh had been declared by the High Court to be invalid.

Dhim Singh's defence was that Barumal always denied the existence of a contract and the claim of Barumal therefore as to the repayment of the debt was barred by limitation. When the matter came up to the High Court it was held that the defence was sound in law and Barumal's suit was dismissed on the ground of limitation. The decision of

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the High Court was set aside by the Judicial Committee. Delivering judgment Lord Hobhouse observed :—

"Their Lordships find themselves unable to agree with the High Court as to the nature of the claim. The thing that it is substantially upto upon the right ground in the plaint. It must be remembered that it has throughout been common ground to both disputants that there was a contract made between them and that among its terms were the sale of villages for Rs. 55,000/-, the reteniion by Dhum Singh of his debt of Rs 33,359/3/6 as part payment and the payment by Bharumal of the balance. Their quarrel was about other matters. In their Lordships view the decree of the High Court in 1884 brought about a new state of things, and imposed a new obligation on Dhum Singh. He was no longer in the position of being able to allege that his debt to Bharumal had been wiped out by the contract, and that in state thereof Bharumal was entitled to the villages. He became bound to pay that which he had retained in payment for his land".

It is therefore apparent that the obligation to pay compensation or to restore the benefit received under a void agreement is completely different from that under the agreement itself. The obligation to make compensation in respect of the contract discovered to be void, is like a phoenix that can be raised again by one of the parties from the dead ashes of its former self'. Before the new right can come into being the old right must die, the cause of action under sec. 65 of the contract act cannot exist side by side with the cause of action under the contract itself. The difficulty felt by me in dismissing outright the plaintiff's claim under sec. 65 is due to the decision in the case of *Raja Mohan Manucha* v. *Manzur Ahmed Khan* (1) and to two other judgments to which I shall presently refer. But in my opinion these judgments should be considered as exception to the general law that a paety should not be allowed to succeed on a case not made out in the pleadings.

(1) (1942) L. R. 70 I. A. 1

In *Haranath Kuar* v. *Inder Bahadur Singh* (1) the Judicial Committee upheld the claim under sec. 65. The appellant instituted a suit to recover from the respondent, with mesne profits a half of an Oudh Talukdari State, under a deed of the sale dated January 2, 1880, by which the respondent purported to sell to the Appellant's deceased husband, alternatively the appellant claimed by her plaint to recover Rs. 25,000/- the purchase money, with interest. The subordinate Judge dismissed the suit on the ground that the respondent had merely a right of expectancy in the estate and no property passed under the deed of sale. With regard to the money claimed he held that it was barred by limitation. On appeal, the court of the Judicial Commissioners held that the agreement was void under sec. 23 of the Contract Act; consequently principles of equity could not be invoked to give effect to it.

Before the Board the money claimed was based on sec. 65. Dealing it with this point Sir Lawrence Jenkins observed :

"Though this aspect of the caae has not been satisfactorily presented or developed in the pleadings and the proceedings before the lower courts their Lordships think there are materials on the record from which it may be fairly inferred in the peculiar circumstances of this case that there was a misapprehension as to the private rights of Indar Singh in the villages which he purported to sell by the instrument of of January 2, 1880, and that the true nature of those rights was not discovered by the plaintiff, or Rachpal Singh earlier than the time at which his demand for possession was resisted, and, that was well within the period of limitation".

"It was thus that the agreement was discovered to be void and the discovery in their Lordships' view was one within the words and the meaning of sec. 65 of the contract Act".

In the case of *Babu Raja Mohan Manucha* v. *Manzoor Ahmed Khan* (2) the claim on a mortgage executed by the defendant respondent in favour of the appellant was resisted

(1) (1922) L. R. 50. I. A. 69.
(2) (1942) L. R. 70. I. A. 1.

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on the plea that the absence of written permission by the Collector of the district under paragraph II of the Third Schedule to the Code of Civil Procedure rendered the mortgage void. This plea was upheld by the trial Judge and the suit was dismissed. The claim on the personal covenant contained in the mortgage deed was held to be barred by limitation. The Chief Court of Lucknow refused to entertain the claim under section 65. In the course of argument before the Board counsel formally asked for, and was granted permission to abandon the claim on the personal covenent and to treat the whole transaction as rescinded on the discovery that the Mortgage was void. Sir George Rankin, who delivered the judgment of the Judicial Committee observed :

".....the transaction in question in the present case was an open and honest transaction and.....its invalidity was at the time obscured by the difficulty in applying para II of the Third Schedule correctly to the particular facts.....For ten years payments of interest were made and received thereunder. In these circumstances their Lordships are of opinion that in the special circumstances of the case the security of August 7, 1934. On his view no question of limitation can arise under section 65 since the circumstances giving rise to their right to rescind did not come to the appellants knowledge until after the action brought". Referring to the Chief Court it was observed "Their Lordships think that their attitude towards the question of pleading was unduly rigid.

A defendant who when sued for money lent pleads that the contract was void can hardly regard with surprise a demand that he restore what he received thereunder. What defence the respondents can have desired to make on this aspect of the case is not revealed by anything in the judgment of the Chief Court, apart from the question of limitation, with which their Lordships have already dealt, and from the contention that section 65 cannot apply where there is a transfer of property and not a mere agreement.....

There is no reason to apprehend that by allowing the appellants to obtain relief under section 65 any injustice to the respondent can result. On the contrary, *prima facie* it is hardly just that the fights of the parties in respect of the transaction of August 12, 1919, should be dealt with impart and in part postponed. Though it is a matter of discretion, result so inconvinient needs to be justified by solid reason and their Lordships see no sufficient reason to prevent restitution being ordered in this case".

My attention was also drawn to the judgement of the Supreme Court in the case of *Sriniwas Ramkumar* v. *Mahabir Prasad & ors.* (1) In this case the plaintiff had paid Rs. 30,000/- to the defendant, and the question was as to the terms on which it was paid. The plaintiff claimed that there was an agreement between the parties thereby the defendants covenanted to sell a property for Rs. 34,000/- and had put him in possession of the house agreed to be sold in part performance of the contract, promising to execute the conveyance as soon as the title deeds were returned from a third party. The defendants contended that there never was any agreement to sell the house and that the story of the contract of sale as set up was entirely false. The defendants admitted the advance of Rs. 30,000/- by the plaintiff, but their case was that it was meant as a loan carrying interest at 6 per cent and possession of the property was given for facilitating payment of interest due on this loan and not in part performance of the contract of sale. The Subordinate Judge came to the conclusion that the story of the contract of sale as alleged by the plaintiff was not established and dismissed the plaintiff's claim for specific performance but gave a decree on the defendant's admission.

The plaintiff preferred an appeal to the High Court of Patna. The High Court, however, took a different view and dismissed the suit in its entirety. The Supreme Court felt to grant the plaintiff appellant relief and observed that :—

(1) [1951] S. C. A. 277.

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"The rule undoubtedly is that the Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be taken as a surprise by the latter and no question of aducing evidence on these facts could arise when they were expressly admitted by the defendant in his pleading. In such circumstances when no injustice can possibly result to the defendant it may not be proper to drive the plaintiff to a separate suit. As an illustration of this principle reference may be made to the pronouncement made by the Judicial Committee in *Babu Raja Mohan Manchu* v. *Manzur Ahmed Khan*'.(1) The facts were certainly exceptional. There was a clear admission by the defendant and the Supreme Court thought that the justice of the case would be met by granting relief to the plaintiff on the defendant's admission. In the case before me, there is no admission. The defendant has denied the plaintiff's claim in form and in substance. The defence that the contracts were void was taken expressly in the written statements as early as 1950, and I do not see any justification for the plaintiff's conduct in this case. If the plaintiff's case be true that it discovered the agreement to be void only on April 28, 1955, a new cause of action has arisen to the plaintiff on that date which ought to be the subject-matter of separate proceedings.

Entertaining a case not to be found in the pleadings is a procedure which the Judicial Committee has strongly deprecated in many cases. To quote from the judgment in the case of *Murlidhar Chatterjee* vs. *The International Film Co.*, (2)

(1) (1942) L. R. 70. I A. 1.
(2) (1942) L. R. 70. I. A. 35 (44).

"While a rigid practice of refusing leave to amend pleadings is far from commendable, to entertain a case of which the pleadings contain no suggestion is another matter altogether". It will thus be seen that the the facts, both in *Manucha's case* (1) and *Sriniwas Ramkumar's case* (2) were exceptional while in *Haranath Kuar's case* (3) the money claim, which was ultimately upheld, was included in the plaint. In this case, as already mentioned, no application was made for leave to amend the plaint. It was probably not done deliberately in order to avoid the objection which might be taken by the defendant on the ground of section 80 of C. P. Code. The learned counsel for the plaintiff wanted to circumvent this objection by arguing that there would be no necessity of serving a fresh notice under section 80 in a case like this and he relied on the observations of Bombay High Court in the case of *Lady Dinbai Dinshaw Petit & ors.* v. *Dominion of India* (4) This case, however, in my opinon, dose not help the plaintiff, because the learned Chief Justice of the Bombay High Court pointed out that where the amendment of the plaint gives further grounds in support of the contentions and allegations which constitutes the plaintiff's cause of action and are merely by way of amplification of the averments already there, it cannot be said that the cause of action has been altered and that a fresh notice under section 80 of C. P. Code is necessary. Mr. Roy also relied on certain observations of this court in the case of *Ezra -v- Secretary of State for India in Council*, (5) There it was held that if the plaintiff wanted to rely on certain facts which were not within his knowledge at the date of institution of the suit and attempted by suitable amendment of the plaint to incorporate these in the plaint no fresh notice under section 80 is necessary. If the passage relied on means that no fresh notice is necessary because the relief claimed is not altered, although the cause of action made out in the amended plaint is different, I venture to think that it is not in harmony with later

(1) (1942) L. R. 70I.A. 1.
(2) (1951) S. C. R. 277.
(3) (1922) L. R. 50. I. A. 69.
(4) (1950) A. I. R. Bom. 72.
(5) (1902) L. R. 30 Calc 36 at P. 72

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pronouncements of various courts including those of the Judicial Committee. In the case of *Bhagchand Dagadusa* v. *Secretary of State*, (1) the Judicial Committee held that the section was explicit and mandatory and admitted of no limitations and no exceptions. If that be so, I do not see how the plaintiff can excuse itself for not having served the notice under section 80 of the C.P.Code with respect to this new and altered cause of action.

Lastly, I should mention that it has been held in various cases decided by this court from time to time that in respect of a cause of action under section 65 of the Contract Act as against Government, a suit will not lie except after service of a notice under section 80 of C. P. Code. In this connection, the following judgments may be refereed to :— the judgment of Sarkar J. in *Sildi & Co. v. Gov. Gen. in Council*, (2) in *Deokarandas Probhudayal -vs- Union of India*, (3) and my judgment in the suit of *Nalini Ranjan Guha* vs. *Dominion. of India*, (4)

In the result, I hold on Issue No. I that the agreement is void and unenforceable as against the Govt. of India. As regards Issue No. 2, I hold that the plaintiff cannot properly raise it and even if the plaintiff be allowee to raise it, the suit would be bad for want of notice under section 80 of C. P. Code. Moreover, I do not find that the agreement was discovered to be void at that time or in the manner alleged by the plaintiff's witness Taradas Bhattacharjya and the suit would fail on that ground also. In the result, the suit is dismissed with costs. Certified for two Counsel.

Mitra & Mitra : Solicitors for the Plaintiff.
S. K. Mandal : Solicitor for Defendant.

P. K. D. *Suit dismissed.*

(1) (1927) 54. I. A. 338.
(2) Suit No. 1704/1946.
(3) Suit No. 1972/1946.
(4) Suit No. 3584/948.

CIVIL RULE

Before Mr. Justice K. C. Chunder.

Haripada Dey and others

v.

S. N. Haque *

CIVIL

1953

May, 8

West Bengal Premises Rent Control Act, 1950—Secs. 9 (2), 2(10)(b)—What it is necessary to prove in order that Sec. 9 (2) may apply—What is the meaning of standard rent ?

What Sec. 9 (2) of West Bengal Premises Rent Control Act, 1950, requires is to find out first the basic Rent—notional or hypothetical—of the premises in question in December, 1941. "Standard rent", as used in Sec. 9 (2). is not equivalent to standardised rent. According to the definition in Sec. 2 (10) (b), standard rent means not only the rent standardised under Sec. 9 but the rent which would have been fixed if application had been made under Sec. 9 If standerdisation of rent was not on the basis of 1941 or the premises of which the standard rent was fixed had not been in existence in 1941, then even when there has been a standardisation of the rent such evidence will not be at all material. Standardised rent when compared in connection with Sec. 9 (2) must be such as has got relevancy for fixing the rent not at the time when the rent is being fixed but the basic rent as it notionally or hypothatically may reasonably be said to have prevailed in December, 1941. In fixing such standard rent under Sec. 9(2), even if the evidence relates to premises of which the rent has not been standardised but of which the rent in December, 1941, is proved to the satisfaction of the Court, then such rent is relevant because under Sec. 9 such rent would be basic rent of which the standard rent can be found in Schedule A and, therefore, it will come within the latter part of Sub-Clause (b) of Clause 10 of Sec. 2.

* Civil Rule No. 1154 of 1952 against the judgement and order of the Judge 2rd Bench, Court of Small Causes Calcutta passed in Rent Appeal No. 2493 of 1950 and dated 12. 2. 52 reversing those of the Additional Rent Controller, Calcutta passed in Case No.2055A of 1950 and dated 30. 11. 50.

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May, 8.

Application for Revision Under Sec. 32 (4) of the West Bengal Premises Rent Control Act.

The material facts will appear from the Judgment.

Durgesh Prosad Das for the Petitioner.

Jyotish Chandra Pal for the Opposite Party,

Thy Judgment of the Court was as follows :-

K. C. CHUNDER, J. :—This is a revision application by the tenants in connection with the fixation of standard rent of the premises in question, namely, Room No. 23 in P5, Canning Street, Calcutta.

It is not clear from the judgments of the two courts whether section 9 (2) was correctly applied or not, because they give no clear finding as to whether the building was in existence and the premises let in December, 1941. When the case goes back before the Rent Controller he will make the necessary finding on evidence.

Both the courts have proceded upon section 9 (2) of the Rent Control Act, but unfortunately both the courts have compared with wrong materials. It appears that the standard rents as fixed in connection with the same premises were put in and it appears further that evidence was given as regards a shop room in respect of which the rent in December 1941 was proved. Of these the Appellate Court rejected the evidence of the room opposite on the ground that the rent has not been standardised. Further as regards the other evidence in one case standard rent fixed under the ordinance of 1946 was refixed because three years had elapsed already. There is nothing in any of the other judgments to throw light on what was the basic rent of the premises compared in 1941. It appears that none of the standard rents as far as proved in Court gave any indication of the basic rent of any one of them in 1941. The only evidence of rent in December 1941 was that of the room opposite.

It is desirable that the law on the subject should be made clear and then it will be possible for the courts to determine the question in a proper legal manner. What section 9(2) clearly requires is to find out first the basic rent notional or hypothetical of the premises in question in December, 1941. This is what the court has to find. For this purpose it is laid down that the evidence will relate to standard rents of similar premises in the neighbourhood. What has got to be clearly understood is that according to the definition of standard rent, standard rent is not equivalent to standerdised rent. This is the mistake which the Appellate Courts has made. Standard rent, according to the definition, means in section 2(10)(b) not only the standardised rent under section 9, but, as the section says the rent which it would have been fixed if application were made under the said section. This clearly shows that the rents of such premises have not been standardised yet. What is therefore necessary is first to compare standardised rents from which light can be obtained as regards the basic rent in December, 1941. If the standardisation of rent was not on the basis of 1941 or the premises of which the standard rent was fixed had not been in existence in 1941, then even when there has been a standardisation of the rent such evidence will not be at all material because they will not serve the purpose for which such evidence is to be considered by the court, namely, the basic rent in December, 1941. Therefore, standardised rent when compared in connection with section 9(2) must be such as has got relevancy for fixing the rent not at the time when the rent is being fixed but the basic rent as it notionally or hypothetically may reasonable be said to have provailed in December 1941. It is, therefore, apparent that the evidence of the standardised rent taken in this case was not relevant. Then again, in fixing such standard rent under section 9(2) even if the evidence relates to premises of which the rent has not been standardised, but of which the rent in December 1941 is proved to the satisfaction of the Court, then such rent is relevant because under section 9 such rent would be basic rent of which the standard rent can be found in Schedule A and, therefore, it will come within

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the latter part of sub-clause (b) of Clause 10 section 2. Therefore, in the present case the rent of the room opposite, if proved to the satisfaction of the Court to be the rent in December, 1941, would be relevant evidence.

The result, therefore, is that the Rule is made absolute. The case is sent back to the Rent Controller for fixing the standard rent in the light of this judgment.

Costs in all the courts will abide the result.

P. D. *Rule made absolute.*

ORIGINAL CIVIL.

Before Mr. Justice P. B. Mukharji.

RAMBALLAV DHANDHANIA

v.

GANGADHAR NATHMULL

Civil

1956

January, 13

Insurance Act of 1938, Sec. 39 (6)—Married Women's Property Act of 1874, Sec. 6—Whether the nominee is the owner of the money secured by an Insurance Policy.

Where the terms of the nomination were : "I nominate my wife as the person to receive the moneys under the above policy in the event of my prior death", it only provided who should receive the moneys in place of the assured in the event of the death of the assured occuring before the period of endowment was over. The title to receive the money does not necessarily create a title *in rem* to the money, which can be said to be good as against the whole world. A receiver of moneys is not the owner of the moneys. He has only the right to collect the moneys. If the Policy matured before the death of the assured, then the nominee really had no interest in the moneys nor could the nominee claim the moneys. Sub-section (6) of Section 39 of the Insurance Act does not say that the amount secured by the policy shall belong to such nominee but merely says that the amount secured by the policy shall be payable to such nominee. Analysis of Sub sections (1), (2), (4) and (5) of Section 39 leads to the conclusion that nomination does not affect the title to the money secured by a policy but only provides mode of payment to a particular person, who is the nominee, and that inspite of such nomination the policy-holder retains complete power of deposition over the insurance moneys which he can exercise either by transfer or assignment or further endorsement or will and also provides that when such nominees die the money becomes payable to the policy-holder or his legal representatives or heirs. The moneys due under the policy thus continue to belong to the estate of the assured.

Under Section 6 of the Married Women's Property Act, however, if a policy-holder expresses on the face of the policy that it is for the benefit of his wife and/or children it goes beyond his control and beyond the control of his creditors and outside the part of his estate.

+ Original Side Suit 369 of No. 1153

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The proviso to Sub-section (7) of Section 39 of the Insurance Act states that where a nomination in favour of the wife is expressed whether or not on the face of the policy as being made under section 39, Section 6 of the Married Women's Property Act shall not be deemed to apply or to have applied to the policy.

Application by nominee for removal of attachment levied on the moneys payable under Insurance policies effected by policy holders who have since died.

The material facts will appear from the judgment.

S. Roy for the Applicant,

R. C. Deb for the Respondent.

The judgment of the Court was as follows :—

January 13.

P. B. Mukharji, J : - These are three applications and counsel engaged in them are all agreed that the decision in one will cover the decision in the other two, the point of law being the same in each case. The application that was argued before me is the application on behalf of Rama Devi, the widow of Nathmull Periwal deceased of No 26/3, Armenian Street, Calcutta in Suit No. 369 of 1953 (*Ramballav Dhandhania* v *Gangadhar Nathmull*) for removal of the attachment levied at the instance of the plaintiff on the moneys payable under the Insurance Policies effected by the deceased.

The plantiff in this suit obtained a decree against the defendant firm Gangadhar Nathmull. The firm was a registered firm with two partners, Gangadhar Periwal and Nathmull Periwal. The decree was dated the 16th January, 1953. Nathmull Periwal died on the 2nd May, 1955, leaving the applicant as his widow and Dhanpatrai Pachisia as his son-in-law. Prior to his death Nathmull Periwal insured his

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life with Messrs. National Insurance Company Limited under two different Life Insurance Policies for the value of Rs. 25,000/- under each of such Policies. In each of such Policies Nathmull Periwal nominated his widow and son-in-law to receive the insurance moneys. The terms of the nomination in each Policy were as follows :—

> "I Nathmull Periwal, the Holder of Policy No. 558347 do hereby nominate my wife Srimati Rama Devi Periwal, aged 52 years, and my son-in-law Sri Dhanpatrai Panchisia, the survivor or survivors, as the persons to receive the moneys under the above Policy in the event of my prior death I request the National Insurance Company Limited to note the said nomination and send me a written acknowledgment thereof.
>
> Dated at Calcutta this 31st day of March, 1958.
>
> Sd/-Nathmull Periwal."

The nomination in the other Policy was exactly in the same terms, only the Policy number being different. The plantiff decree-holder in execution of his decree obtained on the 17th, June, 1955 a prohibitory order of attachment restraining the applicant from receiving the insurance moneys under the said Policies.

The whole contention of the applicant is that after the death of the assured Nathmull Periwal the moneys due under the Policies did not belong to the estate of the deceased assured and were, therefore, not attachable after his death in pursuance of the decree against him. In other words, the short point is that the moneys payable to the nominee under the terms of the above nomination do not form part of the estate of the deceased judgment-debtor and, therefore, are not answerable for the satisfaction of the decree obtained against him. As will appear from the date of the attachment, such attachment was after the death of the judgment-debtor.

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The main argument on behalf of the applicant was advanced by Mr S. Roy. Such argument was based on section 39 (6) of the Insurance Act of 1938. That section provides :—

> "Where the nominee, or, if there are more nominees than one, a nominee or nominees survive the person whose life is insured, the amount secured by the policy shall be payable to such survivor or survivors."

On the strength of this statutory provision it is argued that the amount secured by the Policy shall be payable to the widow and the son-in-law who are the nominees and survivors in this case and, therefore, moneys due under the said Policy do not belong to the estate of the deceased judgment debtor who was the assured. Mr. Roy contends that the application is made under section 47 of the Civil Procedure Code because the question raised involved the satisfaction, discharge or otherwise of the decree in question and it concerned a representative of the judgment-debtor.

The issue then for decision is whether such nomination in the Insurance Policy takes the moneys due under such Policy out of the estate of the assured. In support of his argument Mr. Roy relied on the decision of ths Court of Appeal in *Krishna Lal Sadhu* vs *Pramila Bala Dassi* (1). That decision was given in the year 1928 before the Insurance Act, 1938 came into operation That authority appears to lay down the proposition that money due under a Policy of Insurance payable to the wife of the insured after his death formed part of the estate of the insured and that no trust was created in favour of the wife by a life policy expressed to be for the benefit of the wife of the assured. *Prima facie* this decision is against the applicant. But Mr. Roy particularly relied on the observations of Ghosh, J. at page 1321 of that report where that learned Judge said :—

(1) [1928] I. L. R. 55 Cal. 1315

"The question depends on whether the plaintiff was entitled to enforce her claim against the Insurance Society. If she was, then there could be no question that the money due under the Policy belonged to her and did not form part of the assets of the estate of the deceased. The plaintiff was no doubt the nominee of the deceased; but she was no party to the contract between the deceased and the Insurance Society."

The learned Counsel for the applicant also relied on the observations of Lord Esher, M. R., in *Cleaver* vs. *Mutual Reserve Fund Life Association* (2) which was quoted at page 1325 of that report of the Calcutta decision and which observations were in these terms :—

"The contract is with the husband and with nobody else. The wife is no party to it. Apart from Statute, the right to sue on such a contract would clearly pass to the legal personal representatives of the husband... I think that apart from any Statute, no interest would have passed to the wife by reason merely of her being named in the Policy."

These observations also are *prima facie* against the applicant. This decision being prior to the Insurance Act, does not in my view assist the applicant's case in any way. What Mr. Roy wanted to do with this case is to discover some reason why section 39(6) of the Insurance Act was put on the Statute Book. His attempt was to show that because apart from Statute there was no right given to the wife and which therefore caused great hardship, the Statute intervened to provide this right to the wife so that the money now belonged to the nominee wife and did not remain part of the estate of the assured. Mr. Roy also drew my attention to the comments appearing in the 3rd Edition of the law of Contract by

(1) [1892] I. Q. B. 147

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Cheshire and Fifoot at pages 361-62 where the learned authors say :—

> "The result of these decisions, it will be observed, in not merely, as in *Price* vs. *Easton* (1) to occasion circuity of litigation, but to prevent the third party from suing at common law at all. So peremptory a veto inevitably tends to injustice. It is quite common for insurances to be taken out by one person on behalf of another—a husband for his wife, or a parent for his child. Yet, even if the policy expressly confers benefits on the third party, the latter has no claim at common law. A result, so inconsistent with the needs of the modern world, demanded the intervention of Parliament, and from time to time Acts have been passed to redress a particular grievance "

Mr Roy thought that this was the logic behind the introduction of the statutory provision contained in section 39(6) of the Insurance Act of 1938 in India.

There are two ways of approach to this argument advanced by Mr. Roy. One is that a statutory provision should always be construed on its own merits if that be possible and if there is no scope for ambiguity, and in such event appeal to history and to reasons for the introduction of the statute is not very helpful because the question would remain whether such history or reason has been clearly put into the language of section of the Statute which is under consideration. It is not in frequent that there was a reason to provide a remedy for a particular situation, but the remedy was put in such language that it ceased to be an answer to the situation intended to be remedied. The other approach is that even assuming that a remedy was given to the nominee under this statutory provision, how far was the remedy intended to go. It is necessary, therefore, to discuss the second approach.

(1) [1333] 4 B & Ad. 433

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According to this argument of Mr. Roy, section 39(6) of the Insurance Act clothes the nominee with the title to own the money payable under the Policy. The language of the section is "the amount secured by the Policy shall be payable to such survivor or survivors." In other words, while formerly perhaps a nominee qua nominee could not demand from the Insurance Company such moneys on the ground that under the Common Law the nominee was no party to the contract of insurance and the Insurance Company had to enquire into the title of the representative of the estate of the assured. The statute, therefore, can easily be explained as providing an expeditious discharge of the liability of the insurance Company by providing that so far as the Insurance Company is concerned the money is payable to the nominee and it need not look to the legal representatives of the assured. In other words, all that sub section (6) or section 39 of the Insurance Act does is to confer on the nominee the right to receive the insurance money as between such nominee and the Insurance Company, but it does not provide for the title or ownership of that money in general.

The actual terms of the nomination are also in my opinion important in this case because all that this Policy does is to create an endowment under which had the assured lived after the period for which the cover was taken, the money would have belonged to the assured and not to his nominees because the eventuality which gave the nominees the right to receive the moneys is stated by the terms of the nomination to be, "I nominate my wife ...as the person to receive the moneys under the above Policy in the event of my prior death", so that if the Policy matured before death then the nominee really had no interest in this money nor could she claim that money. In other words, such insurance moneys really belonged to the estate of the assured and continued to do so. It only provided, in the event of the death occuring before the period of endowment was over, who should receive that money in place of the assured. The title to receive the money does not necessarily

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create a title *in rem* to that money which can be said to be good as against the whole world. A nominee in respect of a policy of insurance under these terms does not become the owner of the money payable to him under the policy. Such nomination only indicates the person who should receive the money should the owner die. A receiver of moneys is not the owner of the moneys. He has only the right to collect the moneys. In my view sub-section (6) of section 39 of the Insurance Act does no more than make the nominee a receiver to receive the moneys from the insurance policy without deciding the question of title. The language used in sub-section (6) of section 39 of the Insurance Act does not say that the amount secured by the policy shall belong to such nominee, but uses the words "shall be payable" to such nominee.

In aid of this conclusion that I have reached the general scheme of section 39 of the Insurance Act can be examined. Sub-section (1) gives the right to a policy-holder to nominate a person before the policy matures for payment, to be paid the money in the event of the death of the policy holder before the time. Sub-section (2) expressly confers on the policy-holder the right, in spite of such nomination and before the policy natures for payment, to cancel or change such nomination either by further endorsement or even by a will. Then again, sub section (4) expressly provides that a transfer or assignment of the policy cancels such nomination. Lastly sub-section (5) provides that in case a nominee or nominees die before the policy matures for payment the amount under the policy is payable to the policy holder or his heirs or legal representatives or the holder of a succession certificate. My analysis, therefore, of sub-sections (1), (2), (4) and (5) of section 39 of the Insurance Act 1938 leads me to the conclusion that such nomination does not affect the title to the money secured by the policy, but only provides a mode of payment to a particular person who is the nominee, and that in spite

of such nomination the policy-holder retains complete power of disposition over such insurance moneys which he can exercise either by transfer or assignment or further endorsement or will. And in any event when such nominees die the money becomes payable to the policy-holder or his legal representatives or heirs. This last provision indicates that the moneys due under the policy continue to belong to the estate of the assured. If the nominees acquire any title to the money by the nomination, then the death of the nominees would not divert the moneys under the policy to the policy-holder or his heirs or legal representatives but to the heirs or legal representatives of the nominees.

I, therefore, hold that sub-section (6) of section 39 of the Insurance Act 1938 does not make the nominee the owner of the money due under the policy.

I shall now take up the other part of Mr Roy's argument that this statutory provision was intended to benifit such persons as the wife of the assured. It appears to me that Mr Ray was too much obsessed with notions of hardship and his enthusiasm to seek reason in the legislative history is misplaced. This will be clear by reference to the next sub-section (7) in section 39 of the Act. So far as married women are concerned wives and widows are amply protected by section 6 of the Married Women's Property Act Sub-section (7) states that the whole of section 39 of the Act shall not apply to any policy of life insurance to which section 6 of the Married Women's Property Act, 1874, applies. If that is so then there is no hardship to the wife or widow. Section 6 of the Married Women's Property Act, 1874 says :

> "A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children,

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or any of them, shall ensure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors or form part of his estate."

Therefore such beneficiaries as the wife or children are amply protected and there is no hardship and all that a policy-holder has to do is to express on the face of the policy that it is for the benefit of wife and/or children. The moment he does so it is beyond his control and beyond the control of his creditors and outside the part of his estate. But this was not what was done in this case. Here this is not a case of wife and/or of children. Here is a case of jointnominees, one nominee being the wife and the other being the son-in-law who were not expressed to be the beneficiaries of this money but who were stated only to have the right to receive the money only in the event of the assured dying before the maturity of the policy. The terms of nomination in this case which I have quoted do not show that the policy was expressed on the face of it to be for the benefit of the wife within the meaning of section 6 of the Married Women's Property Act. The terms of nomination here make the nomination simpliciter which comes under sub-section (6) of section 39 of the Insurance Act. This is not the end of the matter because the proviso to sub-section (7) of section 39 of the Act takes it beyond doubt. That proviso states that where a nomination in favour of the wife is expressed whether or not on the face of the policy as being made under this section, section 6 of the Married Women's Property Act shall not be deemed to apply or to have applied to the Policy. That means that the policy-holder can elect to come either under nomination under sub-section (6) or under trust under sub-section (7) but if he does elect to nominate then such nomination takes it out of the trust under section 6 of the Married Women's Property Act.

This conclusion appears to me also to accord with commonsense. To give the policy holder the right to cancel the nomination by transfer or assignment or will or further endorsement and to provide in the case of the nominee's dying before maturity or before the policy-holder the money to belong to the policy-holder or his heirs or legal representatives and then so to construe sub-section (6) as making such moneys under the policy nominee's own money is to indulge in contradictions. Such rights of the policy holder expressly recognised by the different sub-sections of section 39 of the Act show that the policy-holder has the right of disposition over the moneys in spite of nomination, so that the moneys due under the policy come within the exact language of section 60 of the Civil Procedure Code which describes properties of the judgment-debtors which are attachable. One can understand why section 39 of the Insurance Act does not apply to trusts created under section 6 of the Married Women's Property Act relating to insurance policies. Such trusts are expressly said by the Statute to be beyond the control of the policy-holder and are expressly said not to form part of the estate of the policy holder But the policy holder cannot have the best of both the worlds, on the one hand to have full right of disposition in spite of nomination and at the same time the nominee to have title to the money.

It appears that there is not much of case law on the subject. My attention has been drawn to the decision in *Swami Amardas* vs. *Sri Dadu Dayalu Mahasabha and others* (1) where the learned judge came to the conclusion that a nominee did not become the owner of the money payable under the Policy merely by reason of the nomination but the Policy holder continued to be the owner up to the end of his life and had full power of disposal over it. The learned

(1) [1953] D. L. R. 139

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judge came to the conclusion that such moneys payable under the policy should be treated as part of the testator's assets. The case there arose on the point of Court-fees payable. The decision appears to me not to be in conflict with the conclusions that I have reached.

In the circumstances and for the reasons stated, this application must fail. I, therefore, dismiss this application. I shall not, however, make in the special circumstances of this case the applicant liable for the costs, but I direct that the respondent's cost of the application will be added to his costs in execution of the decree.

K. B. Ghosh & Co. Solicitors for the Applicant

N. K. Ray, Solicitor for the Respondent

P. K, D

Application Dismissed

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Before the Chief Justice P. B. Chakravartti and Mr. Justice S. C. Lahiri.

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Definition of Thika tenant in the Calcutta Thika Tenancy Act, 1949, *as amended by the Calcutta Thika Tenancy (Amendment) Ordinance*, 1952 *—Scope of Sec.* 5(2) *of the ordinance of* 1952*—Meaning of the Expression "Court" appearing in the said Sec.* 5(2)*—"Finality" as used in* 6(6) *of Sec.* 27 *of the Thika Tenancy Act of* 1949.

Where an appeal has been preferred from an order of the Calcutta Thika Tenancy Act Controller and the appeal has ended in a dismissal, the only authority before which an application under Sec. 5(2) of the Calcutta Thika Tenancy (Amendment) Ordinance of 1952 can be made after the dismissal of the appeal is the Appellate Court and not the Controller.

Sec. 5(2) of the Ordinance of 1952 does not contemplate that a person, who has already been found to be Thika Tenant under the main Act of 1949 before its amendment by the Calcutta Thika Tenancy (Amendment) Ordinance of 1952 and who is a Thika tenant also after the amendment, can make an application under Section 5(2) of the Ordinance and have the whole matter between him and his landlord re-opened and re-agitated.

Except in respect of the three classes of tenants referred to in clauses (a), (b) and (c) of Sec. 2 of the Calcutta Thika Tenancy (Amendment) Ordinance of 1952, the definition of Thika tenant as amended by Sec. 2 of the Ordinance of 1952 is wider than the original definition given in the Calcutta Thika Tenancy Act of 1949. The amendment definition drops the reference to various systems mentioned in the original definition and enlarges the class of persons who would come within the purview of the original definition. There could thus be no question that, barring the classes of tenants referred to in clauses (a), (b) and (c) of Sec. 2 of the Ordinance of 1952, persons who had been found to be Thika tenants within the meaning of the original definition would necessarily be such

* Civil Revision Case No 1379 of 1954 against the Order of the Subordinate Judge, 1st Additional Court, Howrah, passed in Misc. Appeal No 180 of 1953 dated 27-2-54 affirming that of the Munsif, 2nd Court, Howrah, passed in Misc. Case No. 300 of 1952 dated 2-5-53.

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tenants within the extended definition substituted by the Ordinance the case contemplated by Sec 5(2) of the Ordinance is therefore the case of a person whose claim to be a tenant under the old definition has been rejected but who found that he could claim the status of a Thika tenant after the promulgation of the Ordinance under the wide definition given in the Ordinance. The object of the provision seems to be to give relief to persons who would be thika tenants under the new definition given in the Ordinance, but who, not having been or not having been able to prove themselves to be, such tenants within the meaning of the Act before its amendment had suffered a decree or order for ejectment because of the lack of that status, between the commencement of the Act and that of the Ordinance.

There are three cases, however, in which the amended definition of a thika tenant is narrower than the original definition. The cases are the cases of persons referred to in clauses (a), (b) and (c) of Sec 2 of the Thika tenancy Ordinance of 1952. Persons of these three classes might perhaps come under the old definition if the condition as to the proof of a system was satisfied but they can never come within the purview of the new definition. This does not justify the conclusion that a person, who was adjudged to be a thika tenant under the main Act of 1949 before its amendment by the Ordinance could make an application under Sec. 5(2) of the Ordinance.

The applicant contemplated by Sec. 5(2) of the Ordinance of 1952 cannot be the landlord

The finality under Sec. 27(6) of the Calcutta Thika Tenancy Act of 1949 is a finality under the Act, Sec. 5(2) of the Ordinance is not a part of the Act but is a provision of an external character.

Application for revision Under Article 227 of the Constitution of India against an order Under Sec. 5(2) of the Calcutta Thika Tenancy (Amendment) Ordinance of 1952 passed by the Appellate Court confirming the order passed by the Controller.

The material facts will appear from the Judgment.

Shyama Charan Mitter for the Petitioner.

Sachindra Chandra Das Gupta, Amiya Kumar Ghose and *Ramesh Chandra Banerjee* for the Opposite Party.

The Judgment of the Court was as follows:—

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P. B. Chakravartti, C. J.:—This Rule involves a question of construction with respect to Section 5(2) of the Calcutta Thika Tenancy (Amendment) Ordinance, 1952, which, we understand, has been causing some difficulty.

The question has arisen out of the following facts:— The Petitioners are in occupation of a certain plot of land situated within the limits of the Municipality of Howrah and they or their predecessors have built some structures thereon. The land is held under the opposite party. On the 15th of March, 1950, the opposite party made an application before the Second Munsif at Howrah sitting as a Controller under the Calcutta Thika Tenancy Act, praying for an order of ejectment against the petitioners on the ground that they were Thika Tenants and had not only defaulted in paying arrears of rent, but had also let out a major part of the holding for more than six consecutive months. The application was thus an application under Clauses (i) and (v) of Section 3 of the Calcutta Thika Tenancy Act, 1949. By an *ex parte* order made on the 9th of September, 1950, the Controller allowed the application. He did not base his order on the ground of default, because he said that an order of ejectment on the ground of default could be averted by making a deposit under section 6 of the Act, but since the petitioners were liable to be ejected, in any event, on the other ground, it would serve no purpose to direct their ejectment on the ground of default. He therefore, allowed the application on the ground of unauthorised sub-letting of a major part of the holding for more than six consecutive months and ordered the opposite party to pay compensation, as required by proviso (ii) to section 4 of the Act. As the petitioners failed to file a statement as to what compensation they would claim, although the Controller asked them to do so, an order was made appointing a Commissioner for the purpose. Further proceedings under the order last mentioned were proceedings when the petitioners filed an application for review under section 27 of the Act. The application was made on the 11th of December, 1950 and thereupon Miscellaneous Case No. 365 of 1950 was started, For some time the original case, which was Miscellaneous Case No. 78 of 1950, and the review case, which was Miscel-

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laneous Case No. 365 of 1950, proceeded on parallel lines, but on the 9th of June, 1951, the Controller directed that Case No. 78 of 1950 would remain in abeyance till Case No. 365 of 1950 was disposed of and would be taken up after the disposal of that case. The review application was dismissed on the 5th of August, 1952, both on the merits and on the ground that it was barred by limitation. Proceedings in Case No. 78 of 1950 were then resumed, but before they could go far, the petitioners preferred an appeal, which was Miscellaneous Appeal No. 176 of 1952. When the appeal was pending, the Calcutta Thika Tenancy (Amendment) Ordinance of 1952 was promulgated and it came into force on the 21st of October, 1952. Thereafter on the 3rd of December, 1952, when the appeal was still pending, the petitioners made an application under section 5(2) of the Ordinance of 1952, but as the records were with the appellate Court, the Controller was unable to deal with the application. The appeal was subsequently dismissed and upon the receipt of the records from the appellate Court, the Controller directed the application under section 5(2) of the Ordinance to be registered on the 22nd of December, 1952. The application was in due course heard and it was dismissed on the 2nd of May, 1953. An appeal taken from the order of dismissal was also dismissed on the 27th of February, 1954. Thereafter, the petitioners moved this Court and obtained the present Rule.

Both the Controller and the learned Judge on appeal have held that section 5(2) of the Ordinance does not contemplate an application by a person who was sued as or found to be a Thika tenant even under the main Act of 1949 before its amendment by ordinance and against whom a decree or order for ejectment had been made in his capacity of a Thika tenant. "On reading section 5(2) of the Ordinance," observes the learned Judge, "I cannot persuade myself to imagine a case of a Thika tenant who having had suffered an order of ejectment to be passed upon a footing that he was so within 1949 Act, could again come either to the Controller or to the Court to find him to be a Thika tenant under 1949 Act as amended by 1952 Ordinance." Both the Controller and the learned Judge have taken the view that the intention of sec-

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tion 5(2) of the Ordinance that it does not apply to a person who has already been found to be a Thika tenant, even within the meaning of the 1949 Act and has suffered a decree or order for ejectment in that character, appears from the terms of the section itself. The learned Judge, however, has added a further ground in support of the view taken by him. He has said that under section 27(6) of the Act, an order made by the Controller shall, subject to any order that may be passed in review, be final and that finality also attaches under that section to any order made by an appellate authority. According to the learned Judge, the petitioners, having availed themselves of the provision for a review and having also appealed, but having failed both in their application for a review and in their appeal, could not fall back upon section 5(2) of the Ordinance and commence a new attack on the order of ejectment. The orders suffered by them had become final.

It was contended before us on behalf of the petitioners that the construction placed by the Controller and the learned Judge on the terms of section 5(2) of the Ordinance was erroneous and that, if the two preliminary conditions mentioned in the first part of the section were satisfied, the person against whom a decree or order for ejectment had been passed, would be entitled as of right to make an application under the sub-section, even though he might have been sued or proceeded against as a Thika tenant in the original proceeding and had been found to be so. The right given by the sub-section to the person against whom a decree or order for possession had been passed was, it was said, unqualified, save by the two conditions laid down in the opening part of the Sub-section.

In order that the validity of this contention may be examined, it is necessary to set out the terms of sections 5(1) and 5(2) of the Ordinance, they read as follows:—

> SUB-SECTION (1):—"Save as provided in Sub-section (2), the provisions of the said Act as amended by this Ordinance, shall apply to all cases pending before a Court or Controller on the date of the commencement of this Ordinance."

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SUB-SECTION (2):—"If at any time between the commencement of the said Act and of this Ordiance, a decree or order has been passed for the recovery of possession of any land and for the other relief, if any, and delivery of possession has not been given, then on application made in this behalf by the person against whom the decree or order was passed, within three months of the commencement of this Ordinance, the court which or the Controller who passed the decree or order shall decide (after hearing the parties and after taking fresh evidence if necessary) whether the person is a Thika tenant within the meaning of the said Act as amended by this Ordinance. If the Court or Controller holds that the person is not such a Thika tenant, it or he shall dismiss the application. If the Court or Controller holds that the person is such a thika tenant, it or he shall set aside the decree or the order and annul the execution proceedings, if any, and—

(i) where the proceedings are before a Court it shall remit the case to the Controller to be dealt with by him according to law;

(ii) where the proceedings are before the Controller, he shall reopen the case and pass a new order."

What is contended on behalf of the petitioners is that the Thika Tenancy Act having come into force on the 28th of February, 1949, the Ordinance having come into force on the 21st of October, 1952, and the order for possession having been made on the 9th of September, 1950, it was passed between the commencement of the Act and of the Ordinance and, therefore, the first condition laid down in section 5(2) was satisfied. It is said, in the next place, that the order is an order for recovery of possession of land and delivery of possession not having yet been given, the second condition is also satisfied. It is said lastly that the petitioners being persons against whom the order was passed, their application was not required to fulfil any other condition and it was clearly maintainable under the express terms of the sub-section.

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I shall deal with this contention presently, but before I do so, I would like to refer to what appears to me to be a second difficulty in the way of the petitioners. Under the terms of section (5) (2) of the Ordinance which I have just read, the application under the sub-section is to be made to "the Court which or the Controller who passed the decree or order." In the present case, the order for possession was originally passed by a Controller, but there was an appeal which was dismissed. In such a case it is at least arguable that after the appellate Court has dismissed the appeal, the only order for possession is an order passed by the appellate Court into which the order of the Controller must be deemed to have merged. If that be so, the tribunal which had passed the decree would be not the Controller but the appellate Court. The word "court" has been explained in Clause (ii) of the explanation attached to section 5 and it is these said that "the expression 'court' includes a court exercising appellate or revisional jurisdiction." It will be noticed that unlike section 37 of the Code of Civil Procedure, the Explanation does not define the expression "the court which passed the decree," but only the expression "Court." If the Explanation had been in the terms of section 37 of the Code of Civil Procedure, the court which passed the decree would include the court of first instance, even though the decree or order to be reopened had been passed by a Court in exercise of an appellate jurisdiction. The present Explanation, however, is limited to the word "Court" and if the extended definition, as given in the Explanation, be substituted for the expression "Court" in sub-section (2), one gets the result that the application would have to be made to the appellate Court which had passed the decree. It would, therefore, seem, at least *prima facie*, that after the petitioners had taken an appeal from the order of the Controller and suffered a dismissal of that appeal, the only authority before which they could make an application after such dismissal would be the appellate Court and not the Controller. I do not, however, desire to rest my decision on that basis, because, unfortunately, the appellate order is not on the record and besides that it was an order of dismissal, we do not know anything about its actual terms. There is some difference of judicial opinion as

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to what an appellate decree or order of affirmance ought to be like in order that the trial Court's decree or order can be said to have merged in it.

To revert now to the question of construction, I find myself unable to accept the view contended for on behalf of the petitioners. There appear to me to be several indications in the sub-section itself which would show that what it contemplates is an application by a person who had been found not to be a Thika tenant under the main Act of 1949 and against whom a decree or order for possession had been passed, or perhaps with respect to whose status there had been no finding at all, but who is a Thika tenant within the meaning of the Act, as amended by the Ordinance. The sub-section does not appear to contemplate that a person who has already been found to be a Thika tenant under the main Act of 1949 before its amendment and who is also a Thika tenant under the Amendment Act, can make an application under the sub-section and have the whole matter between him and his landlord reopened and reagitated, although no question about his status falls to be decided.

Turning now to the terms of the section, it will appear that in many respects they cannot be taken literally. To take but one instance, the decree or order contemplated by the sub-section is described as a "decree or order" passed for the recovery of possession of any land." That language is perfectly general and if one had to go by that description alone, one would have to hold that the decree or order might well be decree or order for the possession of a piece of bare land on which no structure had been constructed by the tenant. Such however, is not the true intention of the sub-section, because it would appear from the terms of sub-section (1) that sub-section (2) is an exception to that sub-section and the earlier sub-section relates to "cases pending before a court or a Controller on the date of the commencement of this Ordinance" and therefore relates to cases under the Thika Tenancy Act or at least cases with which the Act has some concern. I am pointing this out, because it has been contended that we ought to go by the letter of the sub-section and ought not to look further. As to the various indications

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in the sub-section regarding its true intention which I mentioned a few moments ago, the first to be noticed is that the party against whom the decree or order has been passed is described by the sub-sections as "the person." He is not called "the tenant" or "the thika tenant." In the second place, the sub-section provides that the Court or the Controller "shall decide..... ....whether the person is a *thika* tenant within the meaning of the said Act as amended by this Ordinance," "an application made in this behalf." It is thus perfectly clear that the object of the application must be to obtain a decision as to whether the applicant is a Thika tenant within the meaning of the amended definition. It appears to me to be impossible to say that by such a provision, the Ordinance-making authority could have intended that a person who had been admitted or had already been found to be a Thika tenant in the original proceeding could, nevertheless, apply for a fresh decision that he was such a tenant within the meaning of the amended Act. Except in respect of three classes of tenants, the amended definition of Thika tenant is wider than the original definition. It drops the reference to various systems which the original definition contained and, quite obviously, enlarges the class of persons who would come within the original definition contained and, quite obviously, enlarges the class of persons who would come within its purview. There could thus be no question that barring the classes I have mentioned, a person who had been found to be a Thika tenant within the meaning of the original definition would necessarily be such tenant within the extended definition substituted by the Ordinance. There could thus be no point in a person, already admitted or adjudged to be a Thika tenant within the meaning of the original Act, applying under section 5(2) of the Ordinance for a decision that he is a Thika tenant within the meaning of the amended Act as well. Quite obviously, the case contemplated is the case of a person whose claim to be a tenant under the old definition had been rejected, but who found after the promulgation of the Ordinance that he could now claim the status of a Thika tenant under the wider definition and obtain the benefit of the Act. The object of the provision sums to be to give relief to persons who would be Thika tenants under the new definition, but who,

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not having been or not having been able to prove themselves to be, such tenants within the meaning of the Act before its amendment, had suffered a decree or order for ejectment because of the lack of that status, between the commencement of the Act and that of the Ordinance. The object cannot reasonably be taken to be to give persons who are Thika tenants under both the original definition and the amended definition a second chance of a second fight with their landlords for no apparent reason whatever. I therefore think that the decisive factors in arriving at a true construction of the sub-section are not the two preliminary conditions laid down in its opening part, but the scope and the object of the application contemplated, as appearing from the specification of the subject matter of decision. The true test, to my mind, is not to see merely whether the decree or order was passed between the commencement of the Act and that of the Ordinance and whether delivery of possession had been given, but to see whether the applicant could have any reason to make and maintain the application contemplated by the section, or, to put it in another way, whether the application contemplated by the section could possibly or reasonably be made by him. Judged by the test I have just mentioned, it must follow that a person who has already been admitted or adjudged to be a Thika tenant even under the main Act of 1949 and who has suffered a decree or order for possession with his status of a thika tenant taken into account, is not competent to make the application contemplated by the section and it is not such persons that the sub-section contemplates.

A passing reference must now be made to the three cases in which the amended definition of a thika tenant appears to be narrower than the original definition. The three cases are of persons who hold land in perpetuity, persons who hold land under a registered lease for a period expressly stated to be not less than 12 years and persons who use or occupy the land held as a *khatal*. Persons of these three classes might perhaps come under the old definition, if the condition as to the proof of a system was satisfied, but they are excluded from the purview of the new definition. Does this difference justify the conclusion that even a person who was admitted or ad-

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judged to be a thika tenant under the main Act before its amendment, could make an application under sub-section 5(2) of the Ordinance? I find it impossible to hold that he could. It is to be noticed that the applicant contemplated by the sub-section is not the landlord who has obtained a decree or order for possession, but the person who has suffered the decree or order. If the landlord had been given a right to make an application, he could conceivably have come and asked for decision that a person who had been admitted or found to be a thika tenant under the old definition was not such a tenant under the amended definition, because he came under one or other of the three classes which the new definition excepts. An application by the person, who has suffered a decree or an order for ejectment, for a decision that though a thika tenant under the unamended Act, he is no longer such a tenant, because of the exceptions made by the amendment, is not conceivable. I would therefore think that so far as is material for the purposes of an application under section 5(2) of the Ordinance, the amended definition is wider than the old definition and therefore in the case of a person against whom a decree or an order for possession has been made in the capacity of a thika tenant, can have no reason at all to ask for a decision that he is a thika tenant under the amended definition as well by means of an application under the sub-section.

So much as to the language of the sub-section and the nature of the application contemplated by it. such as that language indicates. If one proceeds to the further provisions contained in the sub-section, one must be confirmed in the view that the Ordinance making authority could not have intended to give a person, already found to be a thika tenant under the main Act, a fresh chance of fighting the differences between his landlord and himself over again. The closing part of the sub-section provides that if the Court or the Controller holds that the applicant is a thika tenant, it or he shall set aside the decree or the order and shall annul the execution proceedings, if any, and then shall reopen the case and pass a new order. I have already pointed out what I may only call the absurdity of holding that, by the sub-section,

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the Court or the Controller has been solemnly enjoined by the Legislature to decide that a person who has already been found to be a thika tenant is a thika tenant. Leaving that apart, it is pertinent to enquire how the further steps to be taken by the Court or the Controller, as envisaged by the section can fit in with a reasonable notion of what the Ordinance making authority must have intended. Except with respect to one matter to which I shall presently refer, the Ordinance makes no difference as to the rights and liabilities of either a thika tenant or his landlords as they were under the Act before its amendment. In those circumstances, if a decree or order passed against a person on the basis that he is a thika tenant is to be reopened and a new order in accordance with law is to be passed, the scope of such further proceedings must necessarily be that the same old issues of fact and law that have once been tried out must be re-tried. I cannot imagine the Ordinance-making authority having intended that although a person may have already been dealt with as a thika tenant and all the privileges available to him may have already been considered in the original proceedings and although a decree or order may have been passed against him, because it was found that though a thika tenant, he had made himself liable to ejectment and could claim no protection under the Act, still the very same matters must be reopened and allowed to be canvassed and decided over again, for no other reason that having been a thika tenant, he continues to be a thika tenant and that the definition of a thika tenant has been widened so as to comprise a wider class of persons which in no way concerns him. I cannot conceive of anythingless rational than such a view and I am not prepared to attribute it to the Ordinance making authority.

The one matter which causes a little difficulty is the amendment made by the Ordinance of Clause (v) of section 3 of the Act. Under the clause, as it stood before its amendment, a thika tenant was liable to be ejected, if he had failed himself to use or occupy a major part of the holding for his own residential, manufacturing or business purpose for more than six consecutive months. Once the failure to occupy a major part of the holding for the stated period was found, the

thika tenant would be liable to suffer ejectment and there was no exception or qualification attached to the clause. The Ordinance, however, makes a small amendment and provides that, in such a case, the thika tenant shall not be liable to ejectment from that portion of the holding which he himself occupies and shall be deemed to be a thika tenant in respect of that portion, if he agrees to pay such proportionately fair rent for that portion as may be fixed by the Controller. In a case coming within clause (v) of section 3, therefore a person against whom a decree or order for ejectment has been made as a thika tenant under the unamended Act, may be entitled to some relief, if the decree or order is reopened under the Ordinance. I do not however think that this single exception justifies the view that section 5(2) of the Ordinance contemplates applications even by persons who were dealt with as thika tenants within the meaning of the main Act and directed to be ejected on that basis. As I have already pointed out, except in this one case, in all other cases, the result of reopening the decree or order would almost be radiculous, because it would be a meaningless duplication of proceedings which have already been had between the thika tenant and his landlords and for directing which no reasonable cause can be thought of. In my opinion, the obviously better view to take is that although the Ordinance making authority was making this amendment of clause (v) of section 3, he did not intend that its benefit would be available to a thika tenant in the limited number of cases contemplated by section 5(2) of the ordinance by means of an application under that sub-section That such was not the intention is, to my mind, established by the scope and object of the application contemplated by the section which I have already explained.

Our attention was drawn to a decision of Renupada Mukherjee, J in the case of *Krishnalal Haldar* vs. *Ratha Ranjan Banerji alias Promode Ranjan Banerji*,(1) in which the learned Judge took the view contended for by the Petitioners before us. With great respect to the learned Judge, we are unable to agree with him. He has gone by the two preliminary conditions laid down in the section and held that once

(1) Civil Revision Case No 460 of 1954 decided by the Hon'ble Mr. Justice Renupada Mukherjee dated 14th July, 1954—(unreported).

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those conditions were satisfied, the person against whom a decree or order for possession had been passed, would necessarily be entitled to make an application under the sub-section. I have already pointed out that one ought not to stop at the circumstances contemplated by the section in which an application may be made, but must proceed to consider the kind of application contemplated and see whether such an application could have been provided for by the Ordinance making authority and could be made for any reasonable or intelligible purpose, if the applicant was a person who had already been admitted or found to be a thika tenant in the original proceedings. The reasons I have already given for taking the view need not be repeated.

To my mind the object of the sub-section, broadly looked at, is plain. There was an unfortunate reference to several systems in the original definition of a thika tenant and a very wide class of persons were finding it impossible to prove their status because of the difficulty of proving a system. As a result, between the date when the Act had come into force and the date when the Ordinance was promulgated, several of such persons had been unable to claim the benefit of the Act and had suffered decrees or orders for ejectment. The Houses of Legislature not then being in session, the Governor came to the rescue of that class of persons with the Ordinance of 1952 which enlarged the definition of a thika tenant and gave an opportunity to the persons, against whom decrees or orders for possession had already been made, to claim the status of a thika tenant under the new definition and to have the decrees or orders re-opened. I do not say that a section of an Ordinance, any more than the section of an Act, is to be construed by reference to the back ground of facts, but it appears plainly enough even from the terms of the sub-section that its object was to extend the benefit of the status of a thika tenant to persons who were really thika tenants under the terms and conditions of their leases, but who had had the misfortune of suffering a decree or order for ejectment by reason of the difficulties created by the old definition in regard to the proof of the status. To say that the sub-section creates a general

character in favour of all judgment-debtors under decrees for ejectment from lands, including those who had suffered decrees or orders as thika tenants, to make an application under section 5(2) of the Ordinance and to have a *de novo* trial, appears to me to misread the sub-section.

I would add only one word with reference to the second ground given by the learned Judge in support of his view. That ground, it will be remembered, is that the order of the Controller or the order of the appellate court had become final under sub-section (6) of section 27 and therefore the petitioners had no right to invoke the aid of section 5(2) of the Ordinance. That view appears to me to be misconceived. The finality under section 27(6) is a finality under the Act. Section 5(2) of the Ordinance is not a part of the Act but is a provision of an external character. As a provision of the Ordinance, it belongs to the Ordinance alone and is not directed to be incorporated in the main Act, and even when the Act was subsequently further amended in 1953, the provisions of section 5(2) of the Ordinance were not embodied therein. This section of the Ordinance therefore stands outside the Act and provides a kind of emergency relief to the class of persons contemplated by it who had suffered the misfortune of an ejectment decree or order since the commencement of the Act and before the promulgation of the Ordinance. It is not controlled by the Act but stands apart and, therefore, the ground drawn by the learned Judge from section 27(6) of the Act must be held to be not a valid ground.

For the reasons I have given, this Rule is discharged. As, however, a contrary view of the sub-section was taken at least in one decided case, I would make no order as to costs.

S. C. Lahiri, J.

I agree.

Rule discharged.

P.K.D.

APPELLATE CIVIL.

Before Mr. Justice R. S. Bachawat and
Mr. Justice P. C. Mallick.

NALINI MOHAN CHAUDHURI
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Bengal Co-operative Societies Act 1940 (*Ben. Act* xxi *of* 1940) Sections 86, 87, 138(3), 134, *Rule* 127,—*Dispute between the Society and a member —Reference to arbitration—Award—Execution of the award—Execution found time-barred—Second reference by the Society to arbitration for identical dispute—Second award whether without jurisdiction—Execution of the second award—Whether maintainable.*

A valid award once made under the Bengal Co-operative Societies Act is final and binding upon the parties A second award on a second reference to arbitration of the identical dispute is without jurisdiction and a nullity. Such an award cannot be enforced in execution.

A Co-operative Society obtained an award against a member in respect of a debt due from him. The Society put the decree into execution, but the application for execution was found to be time-barred by the ultimate decision of the High Court. The Society thereupon referred the self same claim as a dispute to arbitration and obtained a second award in their favour. The Society having put the second award into execution,

Held, execution of the second award was without jurisdiction and must fail.

Afzal Hossain v. *Kaigarey Co-operative Society* (1) referred to.

Second Miscellaneous appeal from objections to execution of an award under the Bengal Co-operative Societies Act.

* Appeal from Appellate Order No. 7 of 1954 against of Sri R. N Roy, District Judge of Zillah Malda, in Misc. Appeal No. 9 of 1953, dated the 13th of June, 1953, affirming the order of Shri S. C. Roy, Munsiff, 1st Court, Malda, dated 26th March, 1953.

(1) (1955) 59 C.W.N. 1140.

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The material facts will appear from the judgment.

Rabindra Nath Chaudhuri for the Appellant.

Bijan Behari Das Gupta for the Respondent.

The judgment of the court was as follows:—

R. S. Bachawat, J.:—This is an appeal from a decision of the District Judge, Malda, affirming a decision of the Munsif, First Court, Malda. The appeal arises out of objections filed by the appellant in Money Execution Case No. 26 of 1951 which was started by the respondent for execution of an award obtained by the respondent against the appellant. The respondent is a co-operative bank. The appellant is a member of the Bank. The respondent bank claimed certain moneys from the appellant member. The dispute between them was a dispute touching the business of a co-operative society between a society and a member. The dispute was referred to arbitration and the respondent Bank obtained an award in accordance with the Co-operative Societies Act, then in force. It is common case that the award should be deemed to have been made and to have effect as if it was an award under the Bengal Co-operative Societies Act 1940, when the bank sought to execute the award it was held by the executing court that the execution of the award was barred by limitation. This finding was affirmed by this court. The Bank thereupon made a fresh claim in respect of the identical debt and referred the claim for arbitration under Section 87 of the Bengal Co?operative Societies Act, 1940. On such reference a 2nd award was made in favour of the Bank. The Bank then saught to execute the award. The appellant contended that the award is nullity and it cannot be executed.

Under Section 134 of the Bengal Co-operative Socities Act, 1940, every award is final. Under Rule 127 of the Bengal Co-operative Socities Rules. 1942, the award is enforceable in the same manner as a decree and as if it were a decree.

A valid award made by an arbitrator on reference to arbitration under Section 86 of the Bengal Co-operative

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Socities Act 1940 operates to extinguish and merge the claims and disputes referred to arbitration and is final and binding upon the parties. On the making of the award the arbitrator is *functus officio* with regard to the disputes referred. The arbitrator has no jurisdiction to entertain a second reference and to make a second award in respect of the identical disputes which were previously referred to arbitration and in respect of which he has made his award.

The second award made on a second reference to arbitration of the identical disputes is without jurisdiction and is a nullity. Under Section 133 (3) of the Bengal Co-operative Socities Act 1940 execution of the award may be resisted on the ground that it is without jurisdiction.

I find that Mr. Justice S. R. Das Gupta and Mr. Justice Mallick came to somewhat similar conclusions in *Afzal Hossain* v. *Kaigarey Co-operative Society*(1).

The consequence is that we must pronounce that the second award obtained by the respondent bank is a nullity and that such an award cannot be enforced in execution. We must, therefore, hold that the judgment appealed from is erroneous and should be set aside.

We allow the appeal and set aside the order of the learned District Judge, and the order of the Munsif, First Court, Malda and allow the objections and declare that the award now sought to be executed by the respondent bank is a nullity and cannot be executed against the appellant.

The appellant is entitled to his costs throughout, the hearing fee in this appeal being assessed at two gold mohurs.

Mallick, J.:—

I agree.

Appeal allowed.

R.C.

(1) (1955) 59 C.W.N. 1140.

ORIGINAL CIVIL

Before Mr. Justice P. B. Mukharji.

W. WOOD & SONS LTD.
V.
BENGAL CORPORATION & ANOTHER*

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February, 15.

Arbitration Act 1940, *Sec.* 34—*Application under—What must be shown by the applicant.*

Action in a Court of Law—Inconsistent with readiness and willingness to go to Arbitration.

Arbitration (Protocol and Convention) Act, 1937—*Sec.* 3—*Application for stay of the legal proceedings—Points on which the Court must be satisfied.*

Election to come either under Arbitration under the national statutes or under the Protocol—Agreemtnt to which the Protocol does not apply—No question of stay arises—Construction of the Arbitration clause in the present case.

In an application under Sec. 34 of the Arbitration Act, 1940 for stay of legal proceedings, it is incumbent upon the applicant to show that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration.

It is well settled that an action in a Court of law is inconsistent with readiness and willingness to go to Arbitration.

Weir v. *Johnson* (1) followed:

In an application under Section 3 of the Arbitration (Protocol and Convention) Act, 1937 for stay of the legal proceedings, the Court has to be satisfied that the agreement or arbitration has not become (1) inoperative or (2) cannot proceed or (3) that the dispute is with rtgard to a matter agreed to be referred.

It is open to the parties, subject respectively to the jurisdiction of

* Matter No. 386 of 1954 in re: Suit No. 1298 of 1954. Application to stay all proceedings in Suit No. 1298 of 1954.

(1) (1882) W. N. 159.

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different contracting States who are signatories to the Protocol and Convention, to elect to come either under Arbitration under the national statutes or under Arbitration under the Protocol. If by their Arbitration agreement such parties choose Arbitration under national statutes, the agreement being that the parties should be governed by the English Arbitration Act mentioned in clause 9 of the Agreement, there is then no further scope left for invoking the Protocol Arbitration any more To hold otherwise will be tantamount to saying that there is no sense that parties chose to difftrent competative Arbitration Tribunal to decide dispute under the same contract.

If the agreement be such to which the Protocol does not apply, no question of stay under sec. 3 of that Act arises.

On a construction of the Arbitration clause set out in the berining of the judgment and contained in the Arbitration Agreement dated the 19th October, 1955, it was *held* that by its very terms and language it is an agreement to which Protocol does not apply.

Application by the Defendant under the Arbitration Act, 1940 and the Arbitration (Protocol & Convention) Act, 1937 and in the matter of Arbitration agreement dated the 19th October, 1955.

Action is a commercial cause instituted on the 20th April, 1954 by the Bengal Corporation against W. Wood & Sons Ltd. for recovery of Rs. 60,000/- as damages for breach of contract.

The material facts will appear from the judgment.

Sankar Ghose for the Petitioner.

A. C. Mitra and *Ajoy K. Basu* for the Respondents.

The judgment of the Court was as follows:—

February, 15.

P. B. Mukharji, J.:—This is an application to stay all proceedings in Suit No. 1298 of 1954 pending in this Court between Bengal Corporation and W. Wood & Sons Ltd. The Notice of Motion was taken out by W. Wood & Sons Ltd. on the 23rd August, 1954. The application is made under the Arbitration Act, 1940 and the Arbitration (Protocol and Convention) Act of 1937 as adapted.

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The Arbitration clause on the strength of which the application is sought to be made is in these terms:—

"All questions of differences whatsoever which may at any time hereafter arise between the parties hereto or their respective representatives touching this agreement or the subject-matter thereof or arising out of or in relation thereto respectively and whether as to construction or otherwise, shall be referred to a single Arbitrator in accordance with and subject to the provisions of the Arbitration Acts 1889 to 1934 or any re-enactment or statutory modification thereof for the time being in force."

The Arbitration clause appears as Clause 9 in the Agreement between W. Wood & Sons Ltd. and Bengal Corporation dated the 19th October, 1951 by which the Bengal Corporation agreed to purchase from W. Wood & Sons Ltd. expanding hinges, hatches and locks and suit case components in sufficient quantities to enable the Corporation every year for a term of five years to construct at least 5,000 complete revelation suit case.

This action is a commercial cause instituted in this Court on the 30th April, 1954 by the Bengal Corporation against W. Wood & Sons Ltd. for the recovery of the sum of Rs. 60,000/- as damages for breach of contract on the allegation that the goods supplied by W. Wood & Sons Ltd. were unfit for the purchase for which they were purchased and were unmerchantable. There is also a plea in the plaint for damages for breach of warranty, expressed or implied.

The subject-matter of this action certainly comes within the ambit and purview of the Arbitration clause. What is contended, however, is that there should be no stay of this action because of certain events which have taken place.

In so far as this is an application under section 34 of the Arbitration Act 1940 for stay of legal proceedings, it is incumbent upon the applicant to show that the applicant was at the time when the proceedings were commenced and still

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remains ready and willing to do all things necessary to the proper conduct of the Arbitration. It is contended on behalf of the respondent-plaintiff that the applicant has not been so ready and willing at all in the events that have happened.

It is, therefore, necessary to briefly set out the events. As early as the 24th March, 1953, the applicant wrote to the plaintiff that they had failed to carry out their obligations under the Agreement and, therefore, a demand was made to report to Arbitration in England under the terms of Clause 9 of the Agreement between the parties. A suggestion was made in that letter that both parties should agree to a single Arbitrator to be appointed by the President of the Law Society of England and Wales. There was little response from the side of the plaintiff, with the result that the applicant approached the President of the Law Society who in the circumstances declined to act as a single Arbitrator unless the parties agreed. Persuasion was thereafter exercised by the applicant through the good offices of the Indian High Commission in London to induce the plaintiff to agree to Arbitration. Such persuasion failed, one of the reasons for the failure being that the plaintiff claimed to go to Arbitration under the Indian Arbitration Act on the ground that an arbitration in England would be unhelpful, because all the defective components and parts were lying in Calcutta and it was necessary for Arbitrators to inspect them at site and make a decision. The applicant did not agree to come under the Indian Arbitration Act. As will be seen from the Arbitration Clause, the arbitration intended thereunder was obviously an arbitration under the English Acts as the years of the Statutes referred to therein will unmistakably show. That, in short, is the effect of the correspondence from March, 1953 to November, 1953 as annexed to the affidavit of Sanyal, the constituted Attorney of the applicant affirmed in these proceedings on the 19th May, 1955.

Quite a different chapter began thereafter. The applicant not having succeeded in arranging for an arbitration, instituted proceedings in the Queen's Bench Division in February, 1954 to recover the price on two Bills of Exchange in respect of the said contract. An application was thereafter made by the applicant in those proceedings for leave to serve

the Writ of Summons out of jurisdiction and was presented before the following day, the 27th February, 1954. It is alleged that the Writ was served on the plaintiff here who was the defendant there, on the 23rd March, 1954. The plaintiff did not answer the Writ. The result was that on the 30th April, 1954 the Master gave leave to the applicant and signed judgment for the sum of £5,008-7s-6d together with costs. On the very same date when that judgment was being signed in London, the plaintiff was instituting this action here in this Court. It is alleged by the plaintiff here that there is no proper service of the Writ of Summons of the English Proceedings. It is, however, not material for me in this application to decide whether such Writ was properly or duly served.

On these facts, the point now taken is that if the applicant has himself denounced the Arbitration Agreement by his conduct in taking legal proceedings in the Queen's Bench Division, then he cannot be said to be ready and willing to go to Arbitration. Obviously, even if the plaintiff in this suit could not be persuaded to go to Arbitration, the applicant could easily have taken proceedings in England under the English Arbitration Act for the appointment of an Arbitrator in accordance with the law as provided thereunder. He not having done so, the argument now made on behalf of the plaintiff is that there was no readiness and willingness on the part of the applicant to go to Arbitration or to enforce the Arbitration.

An action in a Court of law is inconsistent with readiness and willingness to go to Arbitration. The point is well settled, and it is unnecessary to discuss any authorities on the subject, and I shall be content by a reference to the passage in the 14th Edition of Russell on the Law of Arbitration at page 66 where the law is stated to be:—

> "That a plaintiff by bringing an action in respect of a matter agreed to be referred shows that he is not at the time when proceedings are commenced ready and willing to do all things necessary to the proper conduct of the Arbitration and therefore is not entitled subsequently to

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apply for a stay."

The authority of *Weir* v. *Johnson* (1) is quoted there. I think on the facts of this case it is impossible to contend that at the time when the suit was instituted here, namely, on the 30th April, 1954, the applicant who had by then already obtained judgment from the Queen's Bench Division in this action, could be said to be ready and willing to go to Arbitration. This application under section 34 of the Arbitration Act, 1940, must, therefore, fail on the ground that the applicant was not ready and willing to go to Arbitration.

It was then contended on behalf of the applicant that although the applicant could not show readines and willingness under the Arbitration Act, 1940, he could still come under section 9 of the Arbitration (Protocol and Convention) Act, 1937 as adapted. That section provides:—

> "Notwithstanding anything contained in the Indian Arbitration Act, 1940 or in the Code of Civil Procedure, 1908, if any party to a submission made in pursuance of an agreement to which the Protocol set forth in the First Schedule as modified by the reservation subject to which it was signed by India applies, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings; and the Court, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

The argument on this section put briefly is that although the Indian Arbitration Act requires readiness and willingness, section 3 of the Arbitration (Protocol and Convention) Act of 1937 does not insist on that requirement and that is the effect

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of the words, "Notwithstanding anything contained in the Indian Arbitration Act, 1940" appearing in that Act. The non-obstante expression in that section emphasises the main difference that while stay under section 34 of the Indian Arbitration Act, 1940 is always discretionary with the Court by reason of the use of the word "may" therein, such stay is an obligation and a mandate upon the Court under the Protocol Act by reason of the use of the word "shall" in that Act provided of course certain conditions stated therein are present. I shall assume without deciding that under the Protocol Arbitration the applicant can apply for a stay without himself being ready and willing as contended by the petitioner in this case. But even then by the very terms of section 3 of the Arbitration (Protocol and Convention) Act, 1937, the applicant cannot be allowed to stay the suit in this case. I shall attempt to set out my reasons very briefly why the applicant cannot have a stay even under the Arbitration (Protocol and Convention) Act, 1937.

The first reason is that even in an application under section 3 of this Act for stay of the legal proceedings, the Court has to be satisfied that the Agreement or Arbitration has not become (1) inoperative or (2) cannot proceed or (3) that the dispute is with regard to a matter agreed to be referred. In my view, none of these conditions is present in this case. If the applicant himself has sued upon the Agreement, then the contract itself on which he has sued now stands merged in the judgment obtained from the Court. Therefore, there is no Agreement or Arbitration which can be said to be still operative or which still able to proceed. For what will happen before the Arbitrator supposing I stay the suit and allow the Arbitration to take place? The first thing that the applicant need do then is to produce the judgment of the Queen's Bench Division before the Arbitrator and the Arbitrator will have no jurisdiction to re-open such decrees or even to go behind it or even to decide the effect of that decree whether it is conclusive or res judicata or otherwise. These are questions which a Court alone can decide in the context of the present Arbitration clause. In other words, the Agreement or the Arbitration applicant who by his own act and conduct by bringing an has become "inoperative" or "cannot proceed." It is the

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action in the Queen's Bench Division has rendered the Agreement or the Arbitration inoperative or incapable of proceeding within the meaning of section 3 of the Arbitration (Protocol and Convention) Act of 1937. For what is the real dispute now? The real dispute now will no longer be the dispute that the plaintiff has raised in this action, but the point whether the judgment and the decree of the Court of the Queen's Bench Division precludes the plaintiff from raising this dispute or making this claim at all. That point is certainly not a matter agreed to be referred under the present Arbitration clause.

My second reason is that it is open to parties, subject respectively to the jurisdiction of different Contracting States who are signatories to the Protocol and Convention, to elect to come either under Arbitration under the National Statutes or under Arbitration under the Protocol. If by their Arbitration Agreement such parties choose Arbitration under National Statutes, such as the course which is chosen by the parties here, the agreement being that the parties should be governed by the English Arbitration Act mentioned in Clause 9 of the Agreement, there is then no further scope left for invoking the Protocol Arbitration any more. To hold otherwise will be tantamount to saying that there is no sense that parties chose two different competitive Arbitration Tribunals to decide dispute under the same Contract. This conclusion becomes clear on the construction of the words," a submission made in pursuance of an agreement to which the Protocol set forth in the First Schedule applies" used in section 3 of that Act. A reference to the First Schedule of that Act will at once show the meaning of those words. Clause 2 of the First Schedule says:—

> "The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place."

Now plainly the Arbitral Tribunal there contemplated has to be governed by the "will" of the parties. It is obvious on the facts of this case that there is no agreed will of the parties on such Arbitral Tribunal. It was contended by

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Counsel on behalf of the applicant that the will of the parties was the contract between the parties or, in other words, Arbitration under the English Arbitration Act. Clearly that argument is erroneous for two reasons: firstly because if that is the Arbitral Tribunal, then it is not a Tribunal under the Protocol and, secondly because the words "will of the parties" in Clause 2 of the First Schedule cannot represent the contract between the parties because wherever the contract between the parties is intended, the First Schedule uses the word 'contract' and not 'will.' For instance, in Clause 1 of the First Schedule the word 'contract' is used and not 'will.' I am fortified in the conclusion by this very cogent reason that Arbitration is always a matter of agreement between the parties and there cannot be two competitive kinds arbitration,—one under the same contract. If the Arbitration clause is so framed in a particular Contract as to allow such competitive Tribunals, the situation may be different although I cannot imagine who in his senses will ever like to do so. But where, as in this case, there is no ambiguity about what kind of Arbitration the parties intended under Clause 9 of the present Agreement, I am of the opinion that no appeal to Protocol Arbitration can be entertained. Before the Court stays any proceeding under section 3 of the Arbitration (Protocol) and Convention Act, 1937, the Court must, in my view, be satisfied that there is a submission to Arbitration "in pursuance of an agreement to which the Protocol applies." That, to my mind, is basic. If the agreement be such to which the Protocol does not apply, then no question of stay under section 3 of that Act arises. I am satisfied on a construction of the Arbitration Clause in this case between the parties that by its very terms and language it is an agreement to which the Protocol does not apply. In fact, the parties chose to elect Arbitration under the English Arbitration Act. There is nothing in the Arbitration (Protocol and Convention) Act, 1937 to suggest that the parties cannot contract out of Protocol Arbitration and submit to Arbitration under the National Statutes of any particular country. The entire origin of Protocol Arbitration was to make possible arbitration between parties subject respectively to the jurisdictions of different Contracting States and where they had not agreed to come to the jurisdiction of any one or

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other State. That basic reason is absent in this case by reason of the fact that both the English Seller and the Indian Buyer agreed to go to Arbitration under the English Arbitration Act.

For these reasons, I dismiss this application with costs.

R.M. *Application dismissed with costs.*

APPELLATE CIVIL.

Before Mr. Justice P. N. Mookerjee.

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August, 5.

Sm. KSHIRODE alias SUNDARI DEI & ORS.
v.
DEBENDRA NATH KAR*

Whether the decision in a previous rent suit as between the plaintiff and the proforma defendant operates as resjudicata in a subsequent suit for declaration of title—What elements are necessary to alter the application of the rule of resjudicata.

The question which arose for determination in the present case was whether in a suit instituted by the plaintiff for declaration that he was the Sole Shebait of the deity Sri Sri Iswar Dadhi Paban alias Dadhi Baman Jiu Thakur or whether the Defendant No. 1 was a Co-shebait of the deity along with the plaintiff. In a revision suit instituted by the plaintiff's father for arrears of rent in respect of some land belonging to the deity against a tenant Defendant No. 1 was made a proforma defendant upon Specific denial in the plaint of the proforma defendant's right to represent the deity as a Co-shebait. The proforma defendant appeared in the previous suit to contest the plaintiff's father's exclusive right to the Shebaitship of the deity and to assert right to be a Co-shebait along with the plaintiff's father. The trial court upheld the proforma defendant's contention that he was a Co-Shebait and directed the proforma-defendant to be made a Co-plaintiff to represent the deity and passed a rent decree in favour of the deity represented by plaintiff's father and the

*Appeal from Appellate Decree No. 455 of 1949, against the decree of Sri D. N. Chakravortti, Sub-Judge, 2nd Court of Zillah Midnapore, dated 31-1-49, in T. A. No. 70 of 1948 affirming the decree of Sri N. B. Chaudhuri, Munsiff, 1st Court, Tamluk, dated the 6th day of Feb. 1948.

proforma Defendants as Shebaits. The tenant appealed for getting rid of the decree and plaintiff's father, claiming to be the sole Shebait filed a cross objection. The tenants appeal was dismissed but plaintiff's father's cross-objection was allowed by the Lower appellate Court. Against this decision the proforma defendant took a Second appeal to the High Court which was summarity dismissed under order 41, rule 11, C.P.C. Although Defendant No. 1 of the present Suit was described as a proforma defendant in the previous rent suit, she was the real contestant in the previous suit on the question of Shebaitship. As there was the requisite identity of parties litigating under the same title and the requisite identity of the issue regarding the claims of the shebaitship was held necessary and heard and finally decided by the appellate court in favour of plaintiff's father in the previous rent suit, the decision of the appellate court in the previous suit, operates as resjudicata in the present suit in plaintiff's favour on the question of Shebaitship. The fact that Defendant No. 1 of the present suit was described as a proforma defendant in the previous suit and the previous suit was a rent suit is utterly immaterial in so far as the question of resjudicata is concerned.

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Appeal by the Defendant No. 1 in a suit for declaration of right to exclusive shebaitship of a deity instituted by the Plaintiff.

The material facts will appear from the judgment.

Sarat Chandra Janah and *Arun Kumar Janah* for the Plaintiffs.

Saroj Kumar Maity and *Basanta Kumar Panda* for the Respondent.

The judgment of the Court was as follows:—

P. N. Mookerjee, J. On 18th April, 1946, the respondent plaintiff instituted the present suit for a declaration *inter alia* that he was the sole shebait of the deity Sri Sri Iswar Dadhi Paban alias Dadhi Baman Jiu Thakur and confirmation of his possession in that capacity, or, in the alternative, for recovery of possession upon a further declaration that the Criminal Court's order under section 145 of the Code of Criminal Procedure in the defendant No. 1 appellant's favour in respect of the said land was illegal and not binding upon him (the plaintiff). In the plaintiffs' suit, there were other consequential prayers in the shape of injunction and recovery of mesne

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profits. The suit was decreed by the trial court and, on appeal, that decision has been affirmed by the learned Subordinate Judge. The contesting defendants Nos. 1 and 2 have now come up in second appeal.

There is no dispute that the suit property belongs to the deity Sri Sri Iswar Dadhi Baman Jiu Thakur. The contest really centres round the question as to whether the respondent plaintiff is the sole shebait of the said deity or whether the defendant No. 1 appellant is also a co-shebait. The plaintiff's exclusive title to the disputed shebaitship was found by the learned Munsif upon consideration of the alleged Nirdeshnama, said to have been left by the common ancestor Gopi Charan alias Gopi Mohan, of which Ext. 7 was put forward by the plaintiff as a true and correct copy, and also upon a previous appellate decision [Ext. 1(b)] in a former suit (Rent suit No. 1247 of 1937) which was held to be *inter partes* and *res-judicata* on the point. The lower appellate court has upheld the decree only on the ground of *res-judicata* while differing from the trial court on the question of construction of the Nirdeshnama and also its authenticity, rejecting the copy (Ext. 7) as inadmissible in evidence.

On the materials before me, the latter part of the decision of the learned Subordinate Judge, namely, on Ext. 7, seems to be quite correct both as to construction and admissibility, and the other question also, namely, *res-qudicata,* appears to have been rightly decided by him. On Ext. 7, I have little to add to the judgment of the learned Sub-ordinate Judge but the question of *res-judicata* presents some apparent difficulty and requires a little discussion and elucidation.

The previous suit (Rent Suit No. 1247 of 1937) was for rent in respect of some land of the deity Sri Sri Iswar Dadhi Baman Jiu Thakur. The suit was brought by the present plaintiff Debendra's father Haradhan as sole shebait of the deity against the tenant as principal defendant and the present defendant No. 1 Kshiroda as a proforma defendant upon the express allegation that she (Kshiroda) was claiming to be a co-shebait and upon a specific denial of her said claim. In the plaint of the said suit, Haradhan claimed to be the sole

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shebait, denied the present defendant No. 1 Kshiroda's claim for shebaitship or co-shebaitship or her right to represent the deity at all with an alternative statement that, if Kshiroda was held to be a co-shebait with him she might be joined as a co-plaintiff to represent the deity. The tenants defence inter alia was that the suit was not maintainable as Kshiroda was a co-shebait with Haradhan and she ought to have joined to represent the deity as plaintiff and there was also no statement in the plaint as to her unwillingness to do so. The proforma defendant Kshiroda appeared in the suit to contest Haradhan's exclusive claim to the shebaitship of the deity Sri Sri Iswar Dadhi Baman Jiu Thakur and she set up and asserted her claim to be a co-shebait. The trial court upheld Kshiroda's contention and directed her to be made a co-plaintiff to represent the deity and passed a rent decree in favour of the deity Sri Sri Iswar Dadhi Baban Jiu Thakur represented by shebaits Haradhan and Kshiroda. The tenant (Principal defendant) appealed for getting rid of the decree and Haradhan also, claiming to be sole shebait, filed a cross-objection, challenging Kshiroda's right to the shebaitship (co-shebaitship) and her right to represent the deity along with Haradhan. The tenant's appeal was dismissed but Haradhan's cross-objection was allowed by the lower Appellate Court and the learned Judge overruled the arguments of Kshiroda's lawyer in support of the trial court's decision, holding her to be a co-shebait Against this decision, Kshiroda took a second appeal (S. A. No. 676 of 1938) to this court which failed at the preliminary stage of hearing under order 41, rule 11 of the Code of Civil Procedure [vide Ext. 1(c)].

I ought to mention here some exhibits [Ext. 1(b)]. I have already said that one of the questions in the above rent suit (Rent Suit No. 1247 of 1937) was whether the suit was maintainable and, in that connection, the lower appellate court held in its said judgment (Ext. 1(b)) that, for the purpose of deciding whether the suit (Rent Suit No. 1247 of 1937) was maintainable or not, it was necessary to see whether the plaintiff was the 16 annas shebait or whether the proforma defendant Kshiroda was also a shebait jointly with him. This question was eventually answered by the learned judge in the plaintiff Haradhan's favour and he found that the plaintiff was the

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sole shebait and was entitled "to succeed in the suit and to maintain the suit." He also recorded a clear and unambiguous finding that proforma defendant Kshiroda was not a shebait to the extent of 8 annas share or any share whatsoever and that she should be removed from the plaint as co-plaintiff to which category she had been transferred under the trial court's order. The plaintiff Haradhan's cross objection was thus allowed in full.

I have set out above the appellate decision [Ext. 1(b)] in some detail just to show that it contains all the necessary elements to constitute it *res-judicata* on the question of title to the relevant shebaitship as between the parties to the present suit, namely, Debendra and Kshiroda. Admittedly, Debendra inherited Haradhan's interest in the shebaitship of the deity Sri Sri Iswar Dadhi Baman Jiu Thakur. In relation to that shebaitship, therefore, Debendra is Haradhan's successor or representative. The primary contest in the present suit relates to the claim to the said shebaitship, plaintiff Debendra claiming exclusive title to the said shebaitship and defendant Kshiroda claiming to be a co-shebait with him. That was also one of the outstanding issues or matters in controversy in the former or previous suit (Rent Suit No. 1247 of 1937) which the appellate court on that occasion considered and found it necessary to decide and actually decided in favour of Debendra's predecessor Haradhan. In the present suit, Debendra, claiming to be the sole shebait of the deity, is the plaintiff and Kshiroda, alleged to be claiming and actually claiming to be a co-shebait, is the main defendant. In the previous suit, namely, Rent Suit No. 1247 of 1937, Debendra's predecessor Haradhan, similarly claiming to be the sole shebait of the deity Sri Sri Iswar Dadhi Baman Jiu Thakur was the plaintiff and Kshiroda also alleged to be claiming and actually claiming to be a co-shebait, was a defendant and although, she was described in the said suit (Rent suit No. 1247 of 1937) as a proforma defendant, she was undoubtedly a primary party interested in the shebaitship and indeed, the real contestant on this point, who eventually failed before the Appellate Court. It is thus clear that the requisite identity of parties, namely, of parties or their representatives litigating under the same title and the requisite identity of the issue, namely, the dispute or the

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rival claims as to the shebaitship, are well established and as that issue was held necessary and heard and finally decided by the Appellate Court in favour of the present Plantiff Debendra's predecessor Haradhan in previous suit (Rent Suit No. 1247 of 1937) it operates as *res-judicata* on the said question in the present suit in plaintiff Debendra's favour and against the defendant Kshiroda. In the context, set out above, the fact that Kshiroda was described as a pro forma defendant or in the earlier suit or that the said earlier suit was a rent suit is utterly immaterial on the question of *res-judicata* [vide *Deokee Nundun Roy* v. *Kalee Pershad*(1), *Maung Sein Done* vs. *Ma Pan Nyun*(2) and *Monjur Mondal* alias *Monjur Hossain* v. *Ahammad Mondal*(3). *Toponidhee Dhiraj Gir Gosain* v. *Sreeputty Sahanee*(4), *Gobind Chunder Koondoo* vs. *Taruck Chunder Bose*(5), *Panchu Mandal* v. *Chandra Kanta Saha*(6), *Midnapore Zemindari Co.* v. *Jogendra Kumar Bhaumik* & *Ors.*(7), *Harekrishna Datta* vs. *Gour Hari Setna Poddar* (8); see also in *Radha Madhub Haldar* v. *Monohur Mookerji*(9) The view I have taken above is directly supported by the observations of Sen, J. in *Jitendra Nath Sarcar* v. *Biswanath Bagchi*(10), where the learned Judge stated the relevant proposition through the medium of an illustration and affirmed it in unequivocal terms. I respectfully agree with the said observations and, if I may point out with respect the two early decisions of this court, relied on by Sen, J. and also cited above by me, namely, *Toponidhee Dhirj Gir Gosain* v. *Sreeputty Sahanee*(4), and *Gobind Chunder Koondoo* v. *Taruck Chunder Bose*(5) appear to be direct supporting authorities on this point. I have further, no doubt in my mind as to the soundness of the proposition, enunciated and affirmed by Sen, J. and I respectfully adopt the same. To some extent also, the other two decisions, reported in *Midnapore Zemindary*

(1) (1867) 8 W.R. 366.
(2) (1932) L.R. 59 I.A. 247.
(3) (1951-52) 56 C.W.N. 506 (since affirmed in Letters Patent Appeal No. 10 of 1952).
(4) (1880) I.L.R. 5 Cal. 832.
(5) (1877) I.L.R. 3 Cal. 145 (F.B.)
(6) (1909) 14 C.L.J. 220.
(7) (1920) 33 C.L.J. 186.
(8) (1932) I.L.R. 59 Cal. 1250.
(9) (1888) L.R. 15 I.A. 97.
(10) (1952) A.I.R. Cal. 201 at p.208.

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Co., Ltd. v. *Kumar Nares Narain Roy*(1) and *Sri Sri Krishna Chandra Gajapati Narayana Deo Maharajulungaru* v. *Challa Ramanna*(2) are relevant and they support the conclusion the conclusion which I have reached in the circumstances of the present case.

In the above view, I affirm the decision of the learned Subordinate Judge, apply the rule of *res-qudicata* against the appellants contention on the question of title to the shebaitship of the deity Sri Sri Iswar Dadhi Baman Jiu Thakur. That is sufficient to sustain the decree, passed by the two courts below in the plaintiffs favour.

This appeal, accordingly, fails and it is dismissed, but, in the circumstances, there will be no order for costs either in this court or in any of the two courts below.

Leave to appeal under clause 15 of the Letters Patent is granted.

Appeal dismissed.

P. K D.

(1) (1921) 33 C.L.J 317
(2) (1931) 36 C.W.N 365 (P.C)

CIVIL RULE

Before Mr. Justice K. C. Das Gupta and Mr. Justice B. K. Guha

SUNIL RAY
V.
BISWANATH DATTA AND OTHERS*

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Civil Procedure Code, Or. 21, rules 46 and 43, Secs 63 and 73—When moveable property is in possession of a third party, the method of attachment to be followed should be that specified in Or. 21, rule 46, C.P.C.—Attachment made in such case in the manner specified in Order 21, rule 43, C.P.C., if a nullity.

* Civil Rule No. 1828 of 1954.

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When the moveable property is in the possession not of the Judgment-debtor but of a third party, an attachment made in the manner specified in Or. 21, rule 43, C.P.C., should not be allowed to continue and the proper method of attachment to be followed is that specified in Or. 21, rule 46, C.P.C. That does not mean that the attachment made in the manner specified in Or. 21, rule 43, C.P.C., was a nullity. Such attachment continues to be an attachment in law unless and until it is withdrawn. In this case the attachment was in fact withdrawn on 5-1-1954. Before the withdrawal the attachment was a valid attachment in law. As the claim had already been made on 26-9-1953 by the petitioner, it was the duty of the Court which held the assets to determine the claim and, if the claim was held to be valid, to distribute the assets rateably between the two decree holders. As soon as the sale was held on 28-9-53, the Court's duty was to determine the claim. The fact, that the court did not do its duty and did not decide the question of rateable distribution then, cannot affect the matter. If on 28-9-53 the petitioner had the right of rateable distribution, what happened subsequently on 5-1-54 was of no consequence. The dismissal of the execution case on a later date would not affect the right to rateable distribution. *Held* that the later event of dismissal of the execution case would extinguish the right to rateable distribution and would have the result of making a party suffer because of the court's inability to perform its duty in time. Such a position cannot be tolerated.

Application under Sec. 115, C.P.C. and Art. 227 of the Constitution of India by the Decree holder for setting aside an order refusing an application for rateable distribution.

The material facts will appear from the judgment.

Ramendra Mohan Chatterjee for the Petitioner.

Phakir Chandra Haldar for the Opposite party.

The judgment of the Court was as follows:—

K. C. Das Gupta, J.:—This Rule is directed against an order refusing an application for rateable distribution. The petitioner got a decree for Rs. 6,890-6-3 against Phani Bhusan Singh on the 15th September, 1953 in suit No. 3414 of 1951 on the original side of this Court. He started execution proceedings in the Court of the Subordinate Judge, Alipore on the 19th September, 1953 after having obtained a certificate of non-satisfaction from this Court in Execution Case No. 19 of 1953. In the application for execution he prayed for attachment and sale of the moveable property described in these words: "New Morris Minor Saloon Car (1953 Model)—temporary registration No. WBX 4028, Engine No. A.P.H.M. 905, Chassis No. F.A.H. 55/160483 Colour black,

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registered in the name of Sinha & Co., Purulia, lying in the premises of G. McKenzie & Co. (1919), Limited, at 208, Lower Circular Road, Calcutta, Dist. 24 Parganas."

In the meantime Biswanath Dutt obtained his decree in Suit No. 17 of 1953 on the Original Side of this Court against the same Phani Bhusan Singh. This was on the 18th June, 1953. He started execution proceedings for the same on the 11th August, 1953 and asked for attachment of the same motor car under or. 21 rule 46 of the Code of Civil procedure and sale of the same thereafter. Attachment in this case was effected on the 18th August, 1953. The motor car was sold on the 28th September, 1953. On the 25th September, 1953, the present petitioner Sunil Roy made his application "under section 73 read with section 63 of the Code of Civil Procedure" for rateable distribution of the sale proceeds.

In the execution Case No. 19 of 1953 an application under section 47 of the Code of Civil Procedure was made by the Judgment-debtor on the ground that there was no valid attachment as, though the motor car was in the possession of a third person G. McKenzie & Co., Ltd., no action was taken under order 21 rule 46 of the Code of Civil Procedure. In disposing of the application under section 47 the executing court stated that the contention that attachment was invalid was accepted by the decree-holder's Advocate and passed the following order: "Hence on the consent of parties the application under section 47 C.P.C. is allowed on consent and the attachment of the motor car is withdrawn. The decree-holder to take steps in the execution case, if any, by 23rd January, 1954." As no step was taken, the execution case was dismissed for default by an order dated the 25th January, 1954.

The court which received the assets on the sale of the motor car has held that there was no attachment in law in Execution Case No. 19 of 1953 and so no action could be taken under Section 63 of the Code of Civil Procedure. It held also there was no question of action under Section 73, as the execution petition of the present petitioner was in a different Court. In that view the Court rejected the prayer for rateable distribution.

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It is contended before us that the Court below failed to exercise the jurisdiction vested in it by law on the erroneous view that there was no attachment in law. The question for consideration is whether there was an attachment in law in Execution Case No. 19 of 1953.

It is not disputed that the court did issue a writ of attachment and that writ was executed. Apparently the writ directed attachment in the manner mentioned in Or. 21 R. 43 of the Code of Civil Procedure, in the view that the motor car was in the possession of the judgment-debtor. Actually, however, the motor car was not in the possession of the judgment debtor, but of a third party G. McKenzie & Co., Ltd. The contention on behalf of the other decree-holder Biswanath is that the attachment made under Or. 21 R. 43 C.P.C. was a nullity and so the legal position was as if no attachment had been made at all. This contention which was accepted by the court below is, in my opinion, unsound. It may be correct to say that where in fact the moveable is in the possession of a third person, an attachment made in the manner specified in Or. 21 R. 43, viz., by seizure should not be allowed to continue and the proper method of attachment under Or. 21 R. 46 be followed. That does not mean that the attachment made in the wrong method was a nullity. In my judgment, the attachment by seizure in such a case continues to be an attachment in law unless and until it is withdrawn. We find that in this case the attachment was in fact withdrawn by an order passed on the 5th January, 1954. The withdrawal took effect on and from the 5th January, 1954. Before the withdrawal, the attachment was a valid attachment in law.

Immediately after the 21st September, 1953 on which the attachment in Execution Case 19 of 1953 was made the position in law therefore was that the same property, viz, the motor car was under attachment by the orders of attachment of two different Courts, by the order of the 5th Subordinate Judge, Alipore in Execution Case No. 19 of 1953 and by the order of the 2nd Subordinate Judge, Alipore in Execution Case No. 57 of 1953. Under section 63 of the Code of Civil Procedure therefore, it became the duty of the Second Subordinate Judge, Alipore under whose decree the property was

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first attached to realise the property and to determine claims thereto. The 2nd Subordinate Judge's Court did realise the assets. What remained to be done was the "determination of the claim" to the sale proceeds. As the claim had already been made on the 26th September, 1953 by the present petitioner it was the duty of the Second Subordinate Judge, Alipore which held the assets to determine the claim and if the claim was held to be valid, to determine the assets rateably between the two decree-holders.

The question has been raised whether the fact that attachment was withdrawn on the 5th January, 1954 stands in the way of the petitioner's right to rateable distribution. The answer to this question must be in the negative. As soon as the sale was held, that is, on the 28th September, 1953, the Court's duty was to determine the claim. The fact that the Court did not do its duty then and did not decide the question of rateable distribution before the 5th January, 1954 cannot affect the matter. If on the 28th September, 1953 the petitioner had the right of rateable distribution, what happened on the 5th January, 1954 was of no consequence. It is worth mentioning here that when after the attachment, the attached property was sold, the attachment had ceased and there was really no scope for withdrawal of any attachment.

At one stage I was inclined to think that as the execution case in which the attachment had been made had itself been dismissed on the 24th January, 1954, no claim remained to be determined thereafter. On further consideration, however, I have come to the conclusion that the dismissal of the execution case on a later date would not affect the right to rateable distribution. To hold that the later event of dismissal of the execution case would extinguish the right to rateable distribution would have the result of making a party suffer because of the Court's inability to perform its duty in time. Such a position cannot be tolerated. I would, therefore, hold, even apart from authority, that once it had become the duty of a Court under Section 63 of the Code of Civil Procedure to make a rateable distribution, that duty must be performed even though thereafter the execution case had been dismissed. The position would obviously be different where the claim

itself was abandoned. I find that a similar view was taken in a case under Section 73 of the Code of Civil Procedure by Mookerjee and Beachcroft, JJ. in *Byomkesh Chakrabortty* v. *Jatindra Nath Roy*(1) of the report their Lordships say:

> "It has been contended, however, on behalf of the opposite party that in as much as the application of the petitioner for execution had been dismissed for non-prosecution on the 13th May, 1912, he was not, on the 20th May, 1912, when he applied to set aside the sale, a person entitled to share in a rateable distribution of the assets within the meaning of r. 90. In our opinion, this contention is unsound. The dismissal of the application on the 13th May, 1912 for non-prosecution did not affect the right of the petitioner to share in a rateable distribution of the assets. It was the duty of the court to grant him relief on the basis of his right which had accrued previously, for there is no suggestion that he had waived or abandoned his claim against the judgment-debtors. In our opinion, on the date on which the application to set aside the sale was made under r. 90 it was made by a person entitled to share in the rateable distribution of the assets and consequently should have been entertained by the Court."

The learned Advocate for the respondents drew our attention to the decision in *Gopal Chandra Bose* v. *Hari Mohan Dutt*(2) and suggested that in that case Mookerjte J. had gone back on the view expressed by him in the earlier case. At P. 50 of the report appears the observation on which the learned Advocate has relied for this suggestion.

> "It may be conceded that if on an application for execution, it has been held that the decree has been satisfied or is barred by limitation or if such application has been dismissed and is not pending at the time when the assets are realised, no valid claim for rateable distribution can be laid under Section 73."

(1) (1913) 18 C.W.N. 1311 at 1312.
(2) (1915) 30 I.C. 49.

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In my judgment these observations do not at all touch the decision of their Lordships in the earlier case. What was being considered in *Gopal Chandra Bose's Case*(1) was whether if the application for execution had been dismissed before the claim for rateable distribution had been made, the application could not be entertained. That is quite a different question from where the application for rateable distribution had been made when an execution case was pending and on a later date the application for rateable distribution was dismissed for non-prosecution.

I have, therefore, come to the conclusion that the learned Court below was bound in law to exercise the jurisdiction in the application for rateable distribution and to make distribution as he thought proper.

I would, therefore, make the Rule absolute, set aside his order refusing the application for rateable distribution and order that the rateable distribution should be made in accordance with law.

The petitioner will get his costs from the contesting opposite party.

B. K. Guha, J.:—
I agree.

Rule made absolute.

P.K.D.

(1) (1915) 30 I C. 49.

APPELLATE CIVIL.

Civil

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March, 25.

Before Mr. Justice R. P. Mookerjee and Mr. Justice P. K. Sarkar.

SUBODH GOPAL BOSE

v.

MRS. BAI KHAIRUNNESSA alias KHAIRUNNESSA BAI*

Bengal Land Revenue Sales Act (Bengal Act XI of 1859)—Section 37 and the Exceptions thereunder—Trespasser if entitled to the Exceptions—Tenancy how created—Erection of structures or long possession if sufficient to raise a presumption of tenancy—Adverse possession, plea and nature of.

The purchaser of n entire estate in the permanently settled districts of Bengal sold for arrears of revenue due on account of the same can annual an under tenure created under the said estate as well as other estates so far as it lies within the estate sold.

Khamankari v. Rani Harshamukhi(1) referred to.

A trespasser cannot invoke the operation of any of the exceptions mentioned in Section 37 of the Bengal Land Revenue Sales Act, 1859.

The special circumstances under which an agricultural tenancy may come into existence or may have come into existence, though no rent is fixed or has been paid, cannot be attracted in the case of non-agricultural tenancies. Tenancies can be created only in a particular manner, and when there is definite proof that no tenancy was created by the owner of a Tauzi, the mere fact of structures having been erected long ago or of possession having been exercised for a long time would not raise any presumption or be sufficient to prove the creation of a tenancy, or the existence of a lease under Section 37 of Act XI of 1859.

Where no foundation for a case of acquisition of tenancy right by adverse possession has been made in the Written Statement and no issue has been raised in the Lower Court, it would be futile to raise such a point in the High Court.

Possession of a limited interest may be as much adverse as possession of complete interest in immovable property, but the nature and effect of possession must depend upon the nature and extent of the rights asserted by the overt conduct and express declaration of the person relying on it.

*Appeal from Original Decree No. 66 of 1953 against the decree of Shri D. N. Das Gupta, Subordinate Judge 1st Court, Alipore of Zillah 24-Parganas, in Title Suit No. 14 of 1948 dated the 30th of August, 1952.

(1) (1948) 47 C.W.N. 582 (F.B.)

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Seshamma v. Chickaya(1).
Ishan Chandra Mitter v. Ramranjan Chakrabutty(2) referred to.

Suit by the Purchaser at revenue sale for recovery of joint possession on annulment of incumbrance.

The material facts will appear from the Judgment.

Atul Chandra Gupta and *Joy Gopal Ghose* for the Appellant.

Apurba Charan Mukherjee and *Provash Chandra Basu* for the Respondent.

March, 25.

R. P. Mookerjee, J.:—The only dispute which falls to be decided in this appeal is whether the plaintiff whose title has been declared by the Trial Court is entitled to recover joint possession of the property in suit.

The subject matter of the present litigation is certain premises in Alipore in the southern part of Calcutta. The plaintiff appellant claims that he had purchased at a revenue sale Touzi No. 6 of the Collectorate of 24-Parganas in January, 1936, in sixteen annas share. He is entitled to have all the lands included within that touzi free from all incumbrances with the right to annul all tenures as also other interests which are not protected under any one of the exceptions detailed in Section 37 of the Bengal Land Revenue Sales Act, 1859 (Act XI of 1859). The plaintiff claims that the land in suit appertains in part to touzi No. 6 aforesaid and the defendant is a trespasser in respect of that portion of the premises which falls within the said touzi; the interest of the defendant is an incumbrance. Notice is alleged to have been given, and the defendant not having allowed the plaintiff joint possession, the present suit had to be filed.

The defence in the main was that no portion of the plot in dispute was covered by touzi No. 6. The defendant had

(1) (1902) I.L.R. 25 Madras 507.
(2) (1905) 2 C.L.J. 125 (136).

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purchased in 1919 the interest of one Ramesh Chandra Sen in 3 bighas 11 cottahs and odd of the premises in Dispute and had subsequently purchased an additional area from the Calcutta Corporation out of the surplus lands put up for sale. The defendant claimed that even if it be found that the land in suit appertained partly to touzi No. 6, the land had been held in permanent right at a fixed rent from before the Permanent Settlement, or in any event before the settlement of touzi No. 6 which had taken place about 1852. Even if it be found that the plaintiff had acquired an interest in touzi No. 6 at a revenue sale, the interest of the plaintiff in the land in suit was a fractional one, intermixed and intermingled with such fractional shares of other co-sharer proprietors of different other touzis and the plaintiff was not entitled to annul any interest in one of such fractional touzis. Alternatively, it was claimed that the right of the defendant was protected under the First, Second and Fourth exceptions mentioned in Section 37 of the Bengal Land Revenue Sales Act, 1859. The defendant stated, inter alia, that immediately after her purchase she had put up very substantial buildings on the plot and for about fifteen years she had been occupying the said premises with the knowledge of the then proprietor of touzi No. 6 from before the said touzi was put up to sale for recovery of arrears of revenue.

Various issues were raised and the learned Subordinate Judge came to the conclusion that the land in suit was covered in part by touzi No. 6 and the plaintiff was entitled to have his title declared as a Revenue Sale auction purchaser. By the notice of annulment, even if legal and valid, the plaintiff was not entitled to recover joint possession to the extent of his share in the property as it must be deemed that the defendant had by the nature of her occupation and user could be taken to have obtained some sort of a lease-hold right in the property, and thus her case was brought within the Fourth exception to Section 37 of the Bengal Land Revenue Sales Act 1859.

The plaintiff has come up to this court on appeal, and the only point raised is that the plaintiff is entitled to recover joint possession. The defendant has neither preferred any

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appeal nor filed any cross-objection. The result, therefore is that the decree of the Trial Court, declaring the plaintiff's title to the property in suit, as prayed for, has become final. A faint attempt was made by the learned Advocate for the defendant respondent to reopen that question in this court, but he gave up that attempt when he found the futility thereof.

In Mouza Alipur the lands of a very large number of touzis are intermixed. Touzi No. 6 is one of those nineteen different touzis (Vide Exhibit 2). The conclusion reached by the trial court that the lands now in suit are covered by different touzis, including touzi No. 6, cannot and has not been assailed.

In *Khamankari v. Rani Harshamukhi*(1), it has been held that the purchaser of an entire estate in the permanently settled districts of Bengal sold for arrears of revenue due on account of the same can annul an under tenure created under the said estate as well as other estates so far as it lies within the estate sold.

The claim of the defendant that she holds a tenancy right in respect of the interest covered by the different touzis, including touzi No. 6, cannot be sustained. It appears from exhibit F, the *putni patta* created in December, 1884, in favour of Gosaidas Ghose that such a *putni* had been created by the proprietors of different touzis of which touzi No. 6 was not one. The settlement that was made in favour of Romesh Chandra Sen was of the interest which had been obtained by Gosaidas under the *putni patta* mentioned above. In the conveyance which was executed by Romesh Chandra Sen in favour of the present defendant, [Exhibit A(1)], it is only the right which was created under the *putni* of 1884 that was being transferred. From a plain reading of the documents, the only case that can be made is that a tenancy right was being created on the basis of the *putni* which was created in 1884. The present defendant, therefore, cannot on the strength of her title deed or the documents of title in favour of predecessors or superior landlords claim her interest to be in excess of the *putni* right. She is therefore, trespasser in respect of the share

(1) (1943) 47 C.W.N. 582.

of the property in suit as is covered by the lands of touzi No. 6. The learned Subordinate Judge however was prevailed upon to accept the position that though there was no proof of actual settlement of lease under touzi No. 6 in favour of the defendant the court would be entitled to presume that the previous proprietor of touzi No. 6 had allowed the defendant or her predecessor to occupy the lands as a tenant.

Reliance was placed in this connection by Mr. Mukherjee on *Bhagoo Bibee* v. *Ram Kant Roy Chowdhury*(1). What was decided in that case was that notwithstanding a party might fail to show that his tenure was created prior to the permanent settlement, yet he was entitled to the benefit of the Fourth exception to Section 37 of Act XI of 1859 in respect of any permanent structures that might be upon his holding. What had been claimed was that the under tenure came within the first exception to Section 37 of Act XI of 1859 as a *mokurari taluk* held at a fixed rent from the time of the Permanent Settlement, secondly, it was contended that there being permanent buildings and other improvements having been effected on the disputed lands, the defendants were further protected by the Fourth exception to Section 37 of the said Act. This Court reversed the decision of the lower Appellate Court on the first point. Certain documents which had been produced in support of the defendants' case that the tenure had been in existence from before the Permanent Settlement had not been properly dealt with by the courts below. If such documents were found to be genuine, there might be ample evidence from which the court might presume, that the under tenure was in existence at the time of the Permanent Settlement. If this point succeeded the plaintiff's suit must fail. On the other alternative defence taken by the defendants it was observed that in respect of that much of the lands comprised in it as was covered with permanent buildings etc. the defendants were entitled to exemption from ejectment under the Fourt Exception to that section. It was not the case of either party that the defendant was a trespasser. The question was whether he had the right of an under-tenure holder from before the Permanant Settlement of from

(1) (1877) I.L.R. 3 Cal. 293.

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a subsequent date. If such a right is to be annulled by the purchaser at a revenue sale, clearly the Fourt exception will be attracted, and such portion of the lands as may be covered by permanent buildings etc. would be excluded from being taken possession of by the purchaser. As was observed by this Court at page 296 of 3 Calcutta referred to above, under such circumstances the court could declare the first party defendant entitled to retain possession of such portion paying rent for such occupation. This decision is not an authority for the proposition that even when a person is found to be a trespasser he can invoke the operation of the Fourt exception or any one of the other exception which are specifically made available for the protection of tenents in occupation.

We have in this connection been referred to the earlier decision in *Brojo Soondar Biswas* v. *Gouri Persad Roy*(1), as also to the subsequent decisions in *Ajgur Ali* v. *Asmat Ali*(2), *Gobind Chandra Sen* v. *Joy Chandra Das*(3), and *Najemodden* v. *Syed Hassan*(4). None of these decisions support the novel proposition which was attempted to be enunciated on behalf of the defendant.

The learned Subordinate Judge has refused the plaintiff's prayer for joint possession relying upon the decision in *Sreemut Ram Dey* v. *Kookoor Chand*(5). We do not think that the observations of this Court in that case can in any way assist the defendant. The substance of the decision in that case was that an auction purchaser at a sale for arrears of revenue creating a *putni* thereof can not sue to annul and undertenure within that *putni* as his entire power under Act XI of 1859 passes to the *putnidar* who alone can institute such a suit. There is no observation in that case where from it can be deduced that a trespasser erecting a substantial structure or digging a tank will be saved from the operation of Section 37 of Act XI of 1859 whereby an undertenure may be annulled by the revenue sale purchaser.

(1) (1852) S.D.A. 645.
(2) (1881) I.L.R. 8 Cal. 110.
(3) (1885) I.L.R. 12 Cal. 327.
(4) (1905) 9 C.W.N. 852.
(5) (1871) L.R. 15 W.R. 481.

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Reliance, however, was placed in this Court on *Ashamoyi Basu* v. *Sarbatosh Sen*(1). It was contended that as had been observed by the Division Bench of this Court, the word "lease" as used in section 37(4) of Act XI of 1859, was used in the ordinary sense of a tenancy, and though a tenancy must be based upon a contract, either express or implied, more non-payment of rent was not conclusive to show that there was no tenancy. There is an apparant fallacy in this argument. What Mukherjea J. (as he then was) observed was that agricultural tenancies often came into existence in Bengal without a definite stipulation as to the amount of rent payable it being understood that as between the owner and the squatter that the latter would pay the amount of rent which was customary or which was fair and equitable. If a man under such circumstances was found to be holding land under another with his consent express or implied, and was legally liable to pay rent to the latter for the land he held, the court would presume that a tenancy had been constituted, even if the amount of rent was not determined and no rent was actually paid.

The special circumstances under which an agricultural tenancy may come into existence or may be presumed to have come into existence, though no rent is fixed or has been paid, cannot be attracted in the case of non-agricultural tenancies. Tenancies can be created only in a particular manner, and when there is a definite proof that no tenancy was created by the owner of touzi No. 6 in the present case, the mere fact that structures had been raised near about 1920-21 and the defendant had been in possession for about a decade and a half would not raise any presumption for less can such evidence be considered to be sufficient to prove the creation of a tenancy, or the existence of a lease under Section 37 of Act XI of 1859.

It might have been possible for the defendant to have made an attempt to prove acquisition of tenancy right by adverse possession. No foundation for such a case had been made in the written statement. No issue had been raised in

(1) (1939) A.I.R. Cal. 526 (S.C.), I.L.R. 2 Cal. 236.

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the Lower Court, and no such attempt had been made in this Court. Only at a later stage of the argument, when an enquiry was made from the court as to whether such a case had been made, that the learned Advocate for the respondent attempted to spin out such a case from paragraph 16 of the written statement.

Paragraph 16 of the written statement refers to an alternative case which was made basing a claim on legal rights, that even though the land in suit was found to appertain to touzi No. 6, the defendant would be protected under the First, Second and Fourth exceptions mentioned in Section 37. No facts were alleged. No materials were referred to either in the written statement or during the evidence that was led during the trial, in support of a case of acquisition of a limited right of tenancy. If such a case had been made the parties would have had an opportunity of adducing evidence on the same, but there was no such attempt.

That possession of a limited interest in immovable property may be just as much adverse for the purpose of barring a suit for the determination of that limited interest as adverse possession of complete interest in the property operates to bar a suit for the whole property is an accepted proposition of law, but as in the case of all kinds of adverse possession, the nature and effect of possession must depend upon the nature and extent of the rights asserted by the overt conduct or express declaration of the person relying on it. Vide *Seshamma* v. *Chickaya*(1), *Ishan Chandra Mitter* v. *Raja Ramranjan Chakrabutty*(2).

Under such cicumstances it is not necessary for us to consider as to what would have been the position had such a case been made, we may, however, just indicate that even if such a case had been made, it would have been a very difficult thing to prove that when a tenant is found to have taken settlement from a number of co-sharers and trespassing upon the lands of one of the co-sharers who has not settled the tenant, how can the latter know of or acquiesce in the defendant raising struc-

(2) (1905) 2 C.L.J 125 (136).
(1) (1902) I.L.R. 25 Mad. 507.

tures over a portion of the amalgamated holding, but it is not necessary for us pursue the matter any further.

The reason given by the learned Subordinate Judge for refusing the plaintiff's prayer for recovery of joint possession cannot be sustained. But at the same time there are difficulties in the way of the plaintiff getting such an order at this stage which had not been adverted to in the judgment of the trial Court. The learned Subordinate Judge was not correct in stating the proposition as one of law that the plaintiff is not entitled to recover joint possession either now or at any stage. If there be difficulties as there are, as we shall indicate immediately, to the plaintiff obtaining joint possession of the property in suit, the plaintiff's prayer is to be dismissed not *in limine* but conditionally.

The lands of a large number of touzis being intermixed, it is not known which portion of the property will be allotted to the owner of touzi No. 6 in a proper suit or proceeding for partition. As to what will be the form of that proceeding it is not for us to anticipate, but the difficulties which are ahed cannot be overlooked. The rights of the plaintiff to get joint possession would be limited to this extent that the plaintiff would not be entitled to enter into occupation at this stage of the property in suit. He must wait till after the result of a proper suit or proceeding, if and when such a suit for proceedings is brought. This is due to the fact that it is not known which portion of the property in suit will be or can be alloted in favour of the plaintiff as the revenue sale purchaser to touzi No. 6.

Mr Gupta appearing on behalf of the appellant indi cated that he would be satisfied with such a limited declaration as the form in which the Subordinate Judge had given the decision it was capable of an interpretation of having a wider implication.

In view of the decision, it is not necessary for us to consider whether the whole of the land in suit which is not covered by buildings is not essential for the enjoyment of the house. That question must be left open to be decided in the

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future suit or proceeding which may be brought for partition.

The result, therefore, is that this appeal is allowed in part and the judgment and decree passed by the Trial Court are modified to this extent only that the prayer for recovery of joint possession by the plaintiff is allowed subject to the condition that the plaintiff will not be entitled to enter into occupation or exercise any right thereon until he obtains a decree or order by a competent court in a suit or proceeding for partition. The declaration of the plaintiff's title to the property in suit, already made by the learned Subordinate Judge stands, as it has already been indicated that that is not the subject matter of the appeal before us.

The plaintiff appellant will be entitled to half the costs of this Court.

Appeal allowed.

P. K. Sarkar, J.

I agree.

R. N. C.

APPELLATE CIVIL

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August, 8

Before Mr. Justice P. N. Mookerjee.

ABHIMANYA HALDAR & ORS
V
TARANI SEN HALDAR & ORS *

Bengal Alienation of Agricultural Land (Temporary Provisions) Act 1944, (Bengal Act V of 1944), Secs. 4 and 7—What, in law, is the true effect of Sec. 7?

The plaintiffs claimed to have purchased the suit properties from Proforma-Defendant no. 5's husband had, during his life-time, sold the properties to defendant No. 1. After the husband's death Proforma-Defendant No. 5, as his heir and legal representative, applied for restoration of the said properties under Sec. 4 of the Bengal Alienation of Agricultural Land (Temporary Provisions) Act 1944 (Bengal Act V of 1944) That application was allowed and she was directed to pay back the sale price etc. in certain instalments. For payment of the outstanding balance of those instalments and other purposes, she sold the suit properties to the plaintiffs. Before the sale the Proforma-Defendant No. 5 had paid back major portion of the sale price and only a small balance was outstanding on the date of the sale which was to be paid by the plaintiffs out of the consideration money of the kabala. The plaintiffs sent to Defendant no. 1 by money order this small balance payable by them; but it was refused. Thereafter the defendants threatened to dispossess the plaintiffs. The plaintiffs therefore instituted the present suit for declaration of their title and confirmation of their possession.

The courts dismissed the suit and it was held that in view of Sec. 7 of the Bengal alienation of Agricultural Land Act, 1944, the plaintiffs' Kabala was invalid in law and the plaintiffs acquired no title under the Kabala.

*Appeal from Appellate Decree No 1011 of 1950 against the decree of Sri U. Gupta, Subjudge 2nd Additional Court, 24 Parganas at Alipore in Title Appeal No. 37 of 1950 dated the 3rd August 1950 affirming the decree of Sri D. Basu, Munsif, 1st Court, Diamond-Harbour dated 1. 12. 1949

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Suit for Declaration of title and confirmation of possession by the vandee under a kabala executed by a person in whose favour an order for restoration of properties has been made under Section 4 of the Bengal Alienation of Agricultural Land Act, 1944

The material facts will appear from the Judgement

Nalini Kumar Mukherjee for the Appellants.

Ribindra Nath Bhattacharyya for the Respondents

The Judgement of the Court was as follows :—

August, 8

P. N. Mookerjee :—J. The facts leading up to this appeal lie within a short compass and they may be briefly stated as follows :—

The appellants who were the plaintiffs in the trial Court claimed to have purchased the suit properties from proforma defendant No. 5 Bakyamoni by a registered Kabala. Ext. 3, sometime in Ashar, 1354 B. S. It appears, however, that Bakyamoni's husband Rai Charan had, during his life-time, sold the said properties to defendant No. 1 in the benami of the latter's sons, defendant Nos. 2 to 4, sometime in 1350 B.S. After Rai Charan's death, Bakyamoni as his heirs and legal representative, applied for restoration of the said properties under Sec 4 of the Bengal Alienation of Agricultural Land (Temporary Provisions) Act, 1944 (Bengal Act V of 1944). That application was eventually allowed and she was directed to pay back the sale price etc. (Rs 49/4/-) in certain instalments, ranging from 1354 B S. to 1358 B. S. For payment of the outstanding balance of these instalments and for other purposes, she sold the suit properties to the present plaintiffs in Ashar, 1354 B. S. Before the sale, Bakyamoni had paid Rs. 29-12-0 out of the above sum of Rs 49/4/- and only a small balance (Rs. 19/8/-) was outstanding on the date of sale which was to be paid by the vendees (the present plaintiffs) out of the co siderat'on money of the Kabala Ext. No. 3 This the plaintiffs sent to defendant No. 1 by Money Order on 20th March, 1948, but it was refused and, thereafter, the defendants threatened to disposses the plaintiffs which necessitated the institution of the present suit for declaration

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of the plaitniff's title and confirmation of their possession and, the suit having been dismissed by the two Courts below, the present Second Appeal has been filed by the plaintiffs.

The Courts below have held that, in view of Sec 7 of the Bengal Alienation of Agricultural Land (Temporary Provisions) Act, 1944, the plaintiff's Kobala (Ext. 3) was invalid in law and the vendees thereunder, namely, the present plaintiffs, acquired no title under their said purchase. In that view, they have dismissed the plaintiff's suit It is necessary, therefore, to consider what, in law, is the true effect of that section.

The case is singularly an unfortunate one and the plain construction of the statute is obviously leading to a great injustice. I have, therefore, tried to find out whether it is possible to prevent the manifest in justice by a justifiable interpretation of the statute in question but the statutory language refuses to yield and possibly justice is really being defeated because of an inadvertent omission on the part of the Legislature. Modern legislation in this country is replete with glaring instances of serious errors, omissions and patent injustice, and the present case is possibly an illustration of the same.

The section, in its relevant part, runs as follows :—

> "A proprietor, tenure-holder, raiyat or under-raiyat to whom any agricultural land has been restored by an order under sub-section (1) of section 4 shall not as long as there remains unpaid any sum payable by such proprietor, tenure-holder, raiyat or under-raiyat, as the case may be, under the order made under that sub-section, alienate by sale ..... such land or any portion thereof and, notwithstanding anything contained in any other law for the time being in force, any alienation so made shall be void and of no effect."

There is no dispute that, at the time of the plaintiff's

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Kabala (Ext 3), a sum of Rs. 19/8/- out of the total sum of Rs. 49/4/-, payable under the order of restoration under sec. 4 of the Act, was outstanding. The Kabala (Ext. 3) was, therefore, void and it has no effect under the section just quoted, namely, sec. 7 of the Act. It is true that the vendees undertook the liability and were ready to discharge it immediately, but that cannot take the Kobala (Ext. 3) out of the mischief of express language of the section. This may be unfortunate, as I have already said, and even unjust, but the language of the statute is too clear to admit of any other interpretation. There is a significant and noticeable departure in the language of this section (sec. 7) from sec. 64 of the Code of Civil Procedure in this respect and, in the above premises, with every inclination to hold in favour of the plaintiffs—appellants, I find the statutory language an insurmountable obstacle Why not withstanding the well-known sec. 64 of the Code of Civil Procedure this different language would be used here by the Legislature is not quite intelligible unless the intention was materially different. Similar language is also to be found in sec 37A(9) of the Bengal Agricultural Debtors Act. That may well indicate a different policy. If the position be really otherwise, it is for the Legislature to make it clear by use of appropriate language. There is certainly no death of it in the English vocabulary and the task is also quite simple.

In the above view of the matter, I agree with the two Courts below in their construction of the relevant sec. 7 and dismiss the present appeal.

There will, however, be no order for costs either in this court or any of the two courts below.

Prayer for leave to appeal under clause 15 of the Letter Patent, is made and it is refused.

In view of the order, passed in the appeal, the appellants alternative revirsional application under sec. 115 of the Code of Civil Procedure, must fail and it is dismissed without costs.

P. K. D. *Appeal dismissed.*

CIVIL REVISION.

Civil

1956

March, 29.

Before Mr. Justice S. K. Sen.

KALACHAND BISWAS

V.

MUNSHI MOBARAK HOSSAIN BISWAS & ORS*

Court Fees Act, (Act VII of 1870)—Suit for specific performance of contract for exchange—Proper Court-fees payable—Sec. 7(x)(a) of the Court Fees Act.

Where the Plaintiff institutes a suit for specific performance of a contract for exchange, that is to say, for having a valid title deed in respect of the land in which he has already been put in posssession, and ask for permanent injunction restraining the Defendants from interfering with his possession, the courtfees payable on the plaint will be computed according to the valuation given by him and not according to the value of the subject matter. The proper Section applicable to such a case will be Section 7(x) (a) of the Court Fees Act.

Appilication for Revision by the Plaintiff under Section 115 of the Code of Civil Procedure.

The material facts will appear from the Judgement.

Prafulla Kamal Das for the Petitioner.

N. R. Biswas & Kamalesh Banerjee for the opp. Parties.

S. K. Sen, J.—This is a revisional application under section 115 of the Code of Civil Procedure. The question raised relates to the valuation of the suit in question for the purpose of court fees. The plaintiff, who is the petitioner in this court, instituted the suit for specific performance of a contract for exchange and for permanent injunction restraining the defendants from interfering with his possession. The suit land measures about 72 bighas in several lots. According to the petitioner he is a refugee from East Pakistan and he had considerable lands in East Pakistan, and he arranged with Mobarak Hossain, defendant No. 1 to exchange

*Civil Revision Case No. 2178 of 1955.

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Mobarak's land in the district of Nadia in West Bengal with the petitioner's land falling in what is now Kusthia district in East Bengal, and deeds of agreement were actually executed between the parties and possession of the respective lands was delivered. On the basis of those agreements Kalachand, the plaintiff, obtained possession of the suit lands with which we are concerned, and delivered possession of his lands of Kusthia district to defendant No. 1, Mobarak Hossain. According to the plaintiff the deeds of exchange were to be executed separately in India and Pakistan and ostensibly they were to be executed as sale deeds with a consideration of Rs. 2150/-. In that view the plaintiff valued the suit at Rs. 2150/- and paid court-fees thereon. This would be the correct valuation if the case be governed by section 7 (x) (a) of the Court Fees Act.

Some defendants other than defendant No. 1, Mobrak Hossain appeared in the case and claimed that they were in possession of several lots out of the suit lands on the basis of subsequent sale deeds executed by defendant No. 1, Mobarak Hossain. They claimed that the suit had been insufficiently valued and that the case would not be governed by section 7(x) (a) of the Court fees Act but that the suit should be valued on the subject matter of the suit, that is on the value of the 72 Bighas of lands. The learned Munsiff agreed with the contentions of the appearing defendants and he held that the valuation given by the plaintiff in the plaint was insufficient and he directed that a commission be issud under section 8C of the Court Fees Act for ascertaining the valuation of the suit property.

Against that order the plaintiff as petitioner has filed this revisional application

The contention of the plaintiff petitioner is that he is in actual possession of the entire suit land, having been put into possession by Mobarak Hossain at the time when the agreement for exchange were executed between the parties. He claimed that the defendants other than defendant No 1 also

tried to interfere with that possession and therefore he asked for injunction for restraining them from such interference. It appears that there was a prayer for temporary injunction ; and after the hearing of the parties the learned Munsiff made a *prima facie* finding that the plaintiff was in possession and granted an injunction restraining the defendants from interfering with such possession If the plaintiff's case be true, he is not seeking the relief of obtaining possession in the suit lands which are extensive in area but he is only asking for the relief of having a valid title deed in respect of the land in which he has already been put in possession by the owner under the agreements of exchange. In such circumstances I am unable to agree with the view of the learned Munsiff that the suit should be valued on the value of the entire subject matter of the suit, that is the value of the entire land. The learned Munsiff relied mainly on a Madras ruling in re : *Amululu Venkamma's case*(1) where it was held that neither section 7 (x) (a) or Article 17B of Sch. II of the Court Fees Act should apply in such a case but that the suit should be valued on the subject matter under Sec.I, Art.1. This was the decision by a single Judge and moreover all the facts do not appear from the judgement which consists of a few lines only There is nothing to show whether the plaintiff in that case who shought specific performance of an agreement for exchange had already been put into possession of the land or he wanted to obtain possession of the land after execution of the deed of exchange. If he wanted possession then it would be quite right to hold that the suit should be valued under Act 1, Sch. 1 of the Court Fees Act, that is advaloram court fees should be paid on the value of the land which the plaintiff wanted to obtain by execution of the deed of exchange. But in a case where the plaintiff is in possession according to him, it would not in my opinion, correct or fair to ask him to value the suit on the valuation of the entire land. The learned Advocate for the plaintiff petitioner has urged that the case would really come under Act 17(vi) of Sch. II

(1) [1944] A. I. R. Mad 252,

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Kalachand Biswas
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S. K. Sen, J.

of the Court Fees Act as applicable to Bengal, which provides that in every other suit where it is not possible to estimate at a money value the subject matter in dispute, and which is not otherwise provided for by this Act the court fees would be Rs 15/-. In support of his contention the learned Advocate for the plaintiff petitioner has referred to the case of *Biraja Charan Nanda* vs. *Sailaja Charan Nanda* (1) where it was held that Act 17(VI) of Sch. 11 of the Court Fees Act would apply in a suit for specific performance of a contract for execution and registration of Trust Deed in respect of the common property of the plaintiff and the defendant. The subject matter of that case was, however, quite different and the ruling cannot apply to the facts of the present case. It has already been mentioned that since two documents as of sale were originally agieed to be executed in India and Pakistan respeetively and the ostensible consideration was agreed to be shown as Rs. 2150/- the case should be considered to come under section 7(x)(a) of the Court Fees Act and therefore the valuation of Rs. 2150/- as put by the plaintiff petitioner must be accepted as correct. If in the course of the suit the plaintiff should seek to add the prayer for recovery of possession, at that stage the trial court would be quite right to ask the plaintiff to revalue the suit on an advalorem basis.

The Rule is, therefore, made absolute and the valuation of the suit as made by the plaintiff petitioner is directed to be accepted. In the circumstances the parties will bear their own costs.

(1) (1938) I. L. R. 2 Cal. 411.

Rule made absolute

R. N C.

CRIMINAL REVISION

Before Mr. Justice J. P. Mitter
and Mr. Justice R. P. Mookerjee

Criminal
1955
September, 6

BELARANI CHATTERJEE
v.
BHUPAL CHANDRA CHATTERJEE*

Code of Criminal Procedure, Sub-sec. (1) *of Sec.* 488—*Explanation added to the first proviso to Sub-sec.* (3), *of Sec.* 488—*Hindu Married Women's Right of Separate Residence and Maintenance Act, XIX of* 1946—*What is sufficient ground to justify a wife's claim to separate maintenance*

Whatever might be the personal law of any wife, she must, in order to entitle her to an order under Sub-section (1) of Sec. 488, Cr. P. C., establish, *inter alia*, that there is a present neglect or refusal on the part of her husband to maintain her. The mere fact of a second marriage cannot *ipso facto* establish "such neglect or refusal" within the meaning of Sub-sec. (1) of Sec. 488, Cr. P. C., for, a man may marry a second time and still not refuse to maintain his first wife. The mere fact that a husband has contracted marriage with another wife or keeps a mistress cannot without more, be said to amount to neglect or refusal on the part of the husband to maintain his wife within the meaning of Sub-sec. (1) of Sec. 488 Cr. P. Code.

Application for revision by the wife under Sec. 435 of the Code of Criminal Procedure

The material facts will appear from the judgment.

A. Dutt and D. P. De for the Petitioner.

Chinta Haran Roy and Arun Kishen Dasgupta for the Opposite Party.

The judgment of the Court was as follows :—

Criminal Revision Case No 184 of 1955, against the order, dated the 30th November, 1954, made by S. B. Sarkar, Esq, Magistrate, 1st Class, Alipore.

Criminal

1955

Bela Rani Chatterjee V. Bhupal Chandra Chatterjee

September, 5

J. P. Mitter, J:—This rule which has been referred to us by Debabrata Mookerjee, J, involves the construction of sub-section (1) of section 488 of the Code of Criminal Procedure. The question for decision is whether a wife is entitled to an order of maintenance under section 488, Cr. P. C. merely upon proof that her husband has contracted marriage with another wife or keeps a mistress.

The facts which give rise to the question are these: The petitioner Belarani Chatterjee was married to the opposite party on February 8, 1947. The marriage did not prove a success. According to the petitioner, while residing at Howrah, the opposite party only became unduly intimate with an unmarried girl but treated the petitioner with great harshness and cruelty. When, in December, 1948, the position became intolerable, the petitioner left the opposite party and went to reside with her relations. In 1950, the opposite party married again, making it impossible for the petitioner to live with the opposite party. On July 28th, 1953, the petitioner filed in the Court of the Sub-Divisional Magistrate at Alipore an application under section 488, Cr. P.C. claiming maintenance from the opposite party.

The opposite party resisted the petitioner's claim on the ground that she was a woman of easy virtue and that, in any event, she had refused to live with him without sufficient cause and that accordingly she was not entitled to claim any maintenance.

The learned Magistrate, *inter alia*, held that cruelty had not been established and that the opposite party's second marriage contracted two years after the petitioner had left her husband was not a sufficient ground to justify the petitioner's claim to separate maintenance.

According to Debarata Mookerjee, J the jurisdiction of a Magistrate under sub-section (1) of section 488, Cr. P. C. rested upon proof of neglect or refusal on the part of a husband

to maintain his wife and that the mere fact that a husband had taken a second wife was not by itself a ground for making an order under the section. P. N. Mookerjee, J. on the other hand, held that in view of the provisions of section 2 of the Hindu Married Women's Right of Separate Residence and Maintenance Act, XIX of 1946, a husband's failure or refusal to give his wife separate maintenance would amount to "neglect or refusal to maintain" within the meaning of section 488, Cr P C. [see-*Panchu Gopal Mondal* v. *Dolly Modak* (1).]

In order to appreciate the two points of view, it is necessary to point out that by an amendment of 1949, the following explanation was added to the first proviso to sub-section (3) of section 488.

"If a husband has contracted marriage with another wife or keeps a mistress it shall be considered to be just ground for his wife's refusal to live with him".

It is clear that the explanation provides a just ground for a wife's refusal to live with her husband when the husband offers to maintain her on condition of her living with him. It is also clear that this provision is applicable to the case of any wife, be she a Christian or a Hindu or a Mahomedan. At first sight it would appear that the effect of the explanation introduced by the amendment of 1949 would be material only after an order under sub-section (1), of section 488 has been made, but the language of the first proviso to sub-section (3) makes it clear that a Magistrate may consider such ground of refusal on a wife's part to live with her husband and make an order under the section, notwithstanding the husband's offer to maintain her on condition of her living with him. In our view, it is not permissible to read into the explanation anything more than what it says in the context of the first proviso to sub-section (3). In our view, it would not be permissible to pray in aid the provisions of the Hindu Married Women's Right to Separate Residence and Maintenance Act for the purpose of

(1) [1955] 96 C.L.J. 147; 59 C W N. 767.

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J. P. Mitter, J

construing sub-section (1) of section 488 of the Code of Criminal Procedure The observations made by P.N. Mookerjee, J, are, if we may say so with great respect too wide. Whatever might be the personal law of any wife, she must, in order to entitle her to an order under sub section (1) of section 488, Cr.P.C., establish, *inter alia*, that there is a present neglect or refusal on the part of her husband to maintain her. The mere fact of a second marriage cannot *ipso-facto* establish "such neglect or refusal" within the meaning of sub-section (1) of section 488, Cr.P.C., for, a man may marry a second time and still not refuse to maintain his first wife. In our view, the mere fact that a husband has contracted marriage with another wife or keeps a mistress cannot, without more, be said to amount to neglect or refusal on the part of the husband to maintain his wife within the meaning of sub-section (1) of section 488, Cr.P.C.

In this case, the learned Magistrate came to certain findings of fact which we do not feel we can upset on the evidence in the case. The learned Magistrate, in our view, rightly held that the opposite party's second marriage some two years after the petitioner had left her husband's protection was not in the circumstances of the case a sufficient ground to entitle the wife to separate maintenance.

The result, therefore, is that this application fails and the Rule is discharged.

Renupada Mukerjee, J. :—

I agree.

Rule discharged

P. K. D.

CIVIL REVISION

Before Mr. Justice R. S. Bachawat
and Mr. Justice S. N. Guha Roy

SARASWATI BALA SAMANTA & Ors
V.
SURABALA DASSI & Ors*

Civil
1956
January, 12

Civil Procedure Code. Order 23, Rule 1.—Civil Rules and orders Vol, 1, Rule 717 to 726; 735 and 736— When a suit for partition is withdrawn, whether pleader's fee should be calculated on the basis of the value only of the share claimed by the plaintiff or on the value of the entire property sought to be partitioned.

If the plaintiff desires to withdraw his suit and does not want permission to institute a fresh suit he is at liberty to do so. The Court has no discretion in the matter and the plaintiff is entitled to withdraw the suit as a matter of right. The plaintiff withdrawing the suit without the permission of the court is liable for such costs as the court may award and is also precluded from instituting any fresh suit in respect of the subject matter of the suit. The withdrawal of the suit does not, however, amount to dismissal of the suit.

The order recording the withdrawal of the suit is not a decree. The order can, however, be formally drawn up when the order directs payment of costs by the plaintiff to the defendant.

Rule 717 of the Civil Rules and Orders, Volume 1, does not apply to a suit for partition where recovery of possession of the property is not claimed. The word "decided" in Rule 721, means, "disposed of". Where a suit is withdrawn the suit is finally disposed of as a result of the withdrawal. Where the plaintiff withdraws a suit not included in Rule 717, Rule 721, applies and the fees of the defendants, pleader ought to be calculated in accordance with Rule 721. Under Rule 721 the fees are to be calculated on the whole value of the suit. For the purposes of jurisdiction the value of the suit is the value of the entire property sought to be partitioned and not merely the value of the share claimed by the plaintiff

Ordinarily in a suit for partition the plaintiff is not entitled to costs up to the preliminary decree. If, however, the suit for partition is improperly resisted, the plaintiff may be awarded costs up to the preliminary decree.

*Civil Revision Case No. 3832 of 1954 against the order passed by the Subordinate Judge, Third Court, Howrah, dated the 15th Nov. 1954.

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1956

Saraswati Bala Samanta
v.
Surabala Dassi

Application for Revision by the Plaintiff under Section 115 of Civil Procedure Code

The material facts will appear from the judgment

Ranjit Kumar Banerjee & Soumendra Kumar Mukherjee for the Petitioners.

Jyotirindra Nath Das and Anil Kumar Mukherjee for the Opposite Parties.

The judgment of the Court was as follows :—

January, 12

R.S. BACHAWAT, J:—This revision application arises out of a suit for partition. The plaintiff claimed to be a co-sharer of several properties and prayed for partition, allotment and exclusive possession of the property allotted. The suit was originally valued at Rs. 16,000 for the purposes of jurisdiction and was also valued at Rs. 15/- for the purposes of court fees. The plaint was subsequently amended by the introduction of several new items of property of which also the plaintiff claimed partition and on such amendment the suit was valued at Rs. 18,000/-. There was a protracted hearing of the suit. Evidence was adduced for twenty days and argument was heard for another four days. At the close of the argument the plaintiff found that he could not possibly succeed in the suit and thereupon he applied for withdrawal of the suit with liberty to institute a fresh suit. This application was rejected. The plaintiff moved a further application for withdrawal of the suit. On this application the learned Subordinate Judge made the following order :—

"As the plaintiff wants withdrawal of the suit the plaintiff do withdraw the same since withdrawal of the suit amounts to dismissal for non prosecution. After a protracted trial the plaintiff came with the prayer. Therefore the defendant shall get costs of the suit. Draw up a decree accordingly." In accordance with the order a formal decree was drawn up which embodied the operative portion of the order.

It is to be noticed that the learned Judge completely misappreciated the legal implications of withdrawal of a suit under order 23, rule 1 of the Code of Civil Procedure. If the

plaintiff desires to withdraw his suit and does not want permission to institute a fresh suit he is at liberty to do so. The Court has no discretion in the matter and the plaintiff is entitled to withdraw the suit as a matter of right. The consequences of withdrawal are mentioned in order 23, rule 1, sub-rule 3. The plaintiff withdrawing the suit without the permission of the court is liable for such costs as the court may award and is also precluded from instituting any fresh suit in respect of the subject matter of the suit. The withdrawal of the suit does not amount to dismissal of the suit for non-prosecution or to dismissal of the suit at all.

The order recording the withdrawal of the suit is not a decree. There was no question, therefore, of drawing the order as a decree. The order recording the withdrawal can however, be formally drawn up under Rule 187 Part 1, Chapter I of the Civil Rules and Orders, Volume I, inasmuch as the order directed payment of costs by the plaintiff to the defendant. We, therefore, treat the so called decree as an order.

The formal order awards to the defendant the sum of Rs. 635/- on account of pleader's fees on Rs. 18,000. The plaintiff has taken exception to the award of this sum of Rs. 635/- on account of pleader's fees. Accordingly he applied to the court for correction of the decree under section 152 of the Code of Civil Procedure. His contention was that the fees should be calculated on the basis of (a) the value of the share claimed by the plaintiff and not the value of the entire estate sought to be partitioned; (b) on the basis of withdrawal of the suit in accordance with Rules 717 and 718 of the Civil Rules and Orders, Volume I. The learned Subordinate Judge was of the opinion that the order was an order adjudging that the suit stood dismissed for non-prosecution and accordingly the defendant was entitled to costs as if the suit had been dismissed. He did not, however, deal separately with the plaintiff's contention that the fee should be assessed on the basis of the value of the share claimed by the plaintiff. He was of the opinion that the plaintiff ought not to succeed in the application and accordingly dismissed the application.

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R. S.
Bachawat, J.

The mode of calculation of fees payable to legal practitioners is regulated by Chapter 28 of the Civil Rules and Orders Volume I. These rules have been framed under section 27 of the Legal Practioners' Act which authorises the High Court to fix and regulate the fees payable by any party in respect of the fees of his adversary's lawyers. Chapter 38 contains 23 rules. Rules 717 to 726 and 735 and 736 deal with the mode of calculation of fees in suits. On the facts of the case clearly Rules 719, 722 to 726 have no application.

Rules 717 deals with suits for recovery of specific property or a share of specific property whether immovable or movable or for breach of any contract or for damages. In our opinion Rule 717 does not apply to a suit for partition where recovery of possession of the property is not claimed. Recovery of immovable property has a technical meaning. Section 8 of the Specific Relief Act and the marginal note shows clearly that recovery of specific immovable property means immovable property. Section 16 of the Code of Civil Procedure shows that recovery of immovable property is different from partition of immovable property. In *Bidhata Rai* v. *Ram Chariter Rai and Ors.* (1) Mr. Justice Mookerjee observed thus:—

"As observed by the learned Judges who decided the case of *Ragindra Lall* v. *Shama Churn* (2) the effect of a suit for partition is not recovery of possesion but to alter the form of enjoyment of joint property by the co-owner".

Rule 718 refers to suits included in Rule 717. Rule 718 provides for cases where such suits are settled, withdrawn, compromised, decided on admission of claim or dismissed for default. Both Rules 717 and 718 cannot apply to this case as this is a suit for partition.

Rule 720 applies to all suits not included in Rule 717 where the plaintiff succeeds. In this case the plaintiff has not succeeded and therefore, Rule 720 has no application. Rule 720 however indicates that a suit for partition of joint pro-

(1) [1907] 12 C.W.N. 37 at p. 39
(2) [1879] 4 C.L.R 417

perty is not included in Rule 717. Ordinarily in a suit for partition the plantiff is not entitled to costs up to the preliminary decree. If the suit for partition is improperly resisted the plaintiff may be awarded costs up to the preliminary decree and accordingly Rule 720 specifically provides for suit for partition of joint property where partition is improperly resisted. The words "suits for partition of joint property where partition is improperly resisted" does not in any way restrict the generality of the word, following, viz, "generally" in all suits not included in Rule 717.

Rule 721 applies to a case where the suit is either dismissed upon merits or is decided in favour of the defendant. It is to be noticed that Rules 717 and 720 apply to a case only where the plaintiff succeeds. Rule 718 specifically provides for cases where the suits included in Rule 717 are settled, withdrawn, compromised, decided on admission of claim or dismissed for default. There is no specific provision in the Rules providing for cases where suits not included in Rule 717 are withdrawn. The Rules however are intended to be exhaustive and to deal with all suits, In this view of the matter, we think that the words "to be decided in favour of the defendant" in Rule 721 ought to be given a wide interpretation. In our opinion the word "decided" means "disposed of". Where a suit is withdrawn there is no adjudication of the disputes in the suit. The suit is however finally disposed of as a result of the withdrawal. In our opinion therefore, where the plaintiff withdraws a suit not included in Rule 717 that Rule 721 applies and the fees of the defendant's pleader ought to be calculated in accordance with Rule 721.

Under Rule 721 the fees are to be calculated according to the scale in Rule 717 on the whole value of the suit. For the purposes of jurisdiction the value of the suit is the value of the entire property sought to be partitioned and not the value of the share claimed by the plaintiff. (vide *Kirty Churn Mitter* v. *Anath Nath Deb*, (1) and *Lala Bhagwat Sahay and others* v. *Rai Pashupati Nath Bose and others* (2) and *Biraj Mohini Das and others* v. *Chintamoni*

(1) (1882) I. L. R. 8 Cal. C 757.
(2) (1906) 10 C. W. N. 564.

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Bachawat, J

Dasi (1) and *Rajani Kanta Bag* v *Raja Bala Dassi* (2). We are of the opinion that the words "on the whole value of the suit" in Rule 721 in a partition suit mean the whole value of the property sought to be partitioned and not merely the value of the share claimed.

In this view of the matter the defendant was clearly entitled to payment of the sum of Rs 635/- on account of pleader's cost.

Although the reasons given by the learned Subordinate Judge are erroneous his conclusion is right and the plaintiff has no ground of complaint in the matter of the award of the fees of the legal practioner.

We therefore pass the following order:

The Rule is discharged. Each party will pay and bear its own costs, in this Court.

Guha Ray, J. I agree.

Rule discharged.

P. K. D.

(1) (1899) 10 C.W.N. 565
(2) (1924) 29 C.W.N. 76

ORIGINAL CIVIL

Before Mr. Justice P. B. Mukharji.

D. L. MILLAR & CO., LTD.

vs.

DALURAM GOGANMULL.*

Civil

1956

March, 16.

Arbitration—Rules of the Bengal Chamber of Commerce & Industry—Award remitted by consent order—Section 16 of the Arbitration Act—Constitution of the Court of Arbitration—Written statement—Opportunity to file a reply—Right of cross-examination before the Arbitrator principles of natural justice applicable to arbitration proceedings.

The consent order remitting the award must be construed as remitting it to the arbitration of the Bengal Chamber of Commerce according to the contract of the parties.

The arbitration agreement between the parties remained operative even where an order to remit the award has been made by the Court under Section 16 of the Arbitration Act, for what the Section says is that, Court remits the award or any matter referred to the arbitration. In other words reference to arbitration still exists.

The consent order did not imply any term saying that the rules of Bengal Chamber of Commerce & Industry would not be applicable at all or that the conduct of such arbitration would not be according to the rules of the tribunal.

Where the contract of arbitration itself prescribes a private procedure of its own, then so long as such agreed private procedure is not against laws and the statutes of the land then such agreed procedure must prevail over the notions and principles of natural justice.

When a contract or agreement for arbitration itself does not lay down any particular procedure for the conduct of the arbitration the Courts have said that the Arbitrators must follow the principles of natural justice which are no other than common sense standards of fairness and impartiality such as no party should be condemned unheard or without representation.

In the absence of any procedure prescribed either by statutor by contract, arbitrators must follow principles of natural justice, or else there is nothing for the arbitrators to fall back upon to ensure fair adjudication.

* Re: Award Case No. 199 of 1954.

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D. L. Miller & Co., Ltd. v. Daluram Goganmull

P. B. Mukharji, J.

On an analysis of rule 17(d) of the Bengal Chamber of Commerce & Industry Tribunal Rules it is to be found that they do not give to a party any unqualified and unfettered legal right to cross-examine. If the arbitrators allow and require such cross-examination they can always permit a party to cross-examine under the ample power contained in the said rule.

It is always unwise to assume that there is only one kind of arbitration. The procedure and method of arbitration subject of course to the Arbitration Act vary according to contract of the parties. The contract of the parties in this case follow the well-known pattern of arbitration.

Application to set aside an Award.

The material facts will appear from the judgment.

E. R. Meyer for the Applicant.

A. C. Bhabra for the Respondant.

The judgement of the court was as follows:—

March, 16.

P. B. Mukharji, J.:—This is an application by D. L. Millar & Co., Ltd., to set aside Award No. 11 of 1955 of the Bengal Chamber of Commerce and Industry dated the 4th January, 1955 and to declare it null and void. Mr. Meyer on behalf of the applicant has urged only three grounds and no others.

His first point of objection is that the court of Arbitration which has given the Award in this case was not a properly constituted court on the ground that it violated the consent order remitting the previous Award. His second point of objection is that on the 3rd January, 1955 the Arbitrators received a written statement from the respondent which the applicant was given no opportunity to answer. His third point of objection is that on the 3rd January, 1955 when evidence was being taken, the applicant's representative was denied the right to cross-examine the evidence of the respondent's representative.

No other objection has been urged before me.

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P. B. Mukharji, J.

Before discussing these objections and determining them, the facts of the dispute between the parties and the history of the Arbitration in this matter have to be briefly stated. On the 10th April, 1953 the applicant agreed to purchase a certain quantity of jute to be delivered in April-May, 1953. It is the applicant's case that the respondent delivered only a part of that jute and failed to deliver the balance and that even those goods which were delivered were not of the contracted quality. The applicant thereupon claimed Rs. 7,800/- as damages for inferior quality and Rs. 29,520/- as damages for non-delivery. The respondent claimed Rs. 37,272/- being the price of the goods delivered. Their disputes and differences were referred to the Bengal Chamber of Commerce. On the 22nd February, 1954 an Award was made by the Bengal Chamber of Commerce directing the applicant to pay to the respondent Rs. 37, 245/- and the respondent to pay to the petitioner Rs. 18,450/-. An application was then made by the present applicant on the 24th May, 1954 to set aside that Award. On the 13th July, 1954, by consent of parties the following order was made by Bachawat, J.:—

> "1. The Award is remitted to the Tribunal of Arbitration Bengal Chamber of Commerce and Industry for reconsideration by a Court to be newly constituted consisting of persons different from those who made the Award.
>
> 2. The Award shall be made within five months from the date of receipt of the papers of the Bengal Chamber of Commerce and Industry."

By consent, the costs of an incidental to that application as well as of the judgment upon Award were reserved.

The papers thereafter reached the Bengal Chamber of Commerce from this Court on the 4th or 5th August, 1954. On the 23rd August, 1954, a court was appointed by the Registrar of the Bengal Chamber of Commerce. One of the Arbitrators having expressed his inability to serve on the Court, the Court was re-constituted under Rule 10 of the

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Bengal Chamber of Commerce by appointing somebody else in his place. The intimation of the re-constituted court was sent to the parties on the 3rd September, 1954. On the 27th September, 1954, statement was filed by respondent Daluram Goganmull, and Rs. 400/- was deposited towards the fees of the Tribunal. On the 6th November, 1954, counter-statement was filed by the applicant. The respondent then filed further statement on the 19th November, 1954. On the 23rd December, 1954 the Bengal Chamber of Commerce gave notice to the parties for a meeting to be held on the 3rd January, 1955. The Arbitrators held their meeting on that day. On the following day, the 4th January, 1955, the Award was made by the Bengal Chamber of Commerce. Thereafter on the 18th March, 1955 the present Notice of Motion was taken out to set aside this Award. By a process which I have not been able to understand, this matter was kept pending for one whole year allegedly for the purpose of using affidavits which, in my view, should not have taken more than three weeks at the outside.

I shall take up Mr. Meyer's first objection about the invalidity of the Court of Arbitration. His submission was that by the consent order of the 13th July, 1954, a new type of Arbitration was contemplated. It could only be an Arbitration by one Court. According to Mr. Meyer, it could not be by different Courts, and the Bengal Chamber of Commerce was wrong in re-constituting a Court even though one of the Arbitrators at first mentioned was unwilling to act. In other words, Mr. Meyer's submission was that Arbitration under this consent order was not an Arbitration according to the rules and regulations of the Bengal Chamber of Commerce.

I am afraid this objection has no substance whatever and can be dismissed on three broad grounds. It is true that there was a consent order remitting the Award to the Arbitrators. But an order remitting an Award is made always under section 16 of the Arbitration Act which says expressly that the Court in such a case remits the Award "to the Arbitrators" or umpire for reconsideration upon such terms as it thinks fit. Therefore, this consent order remitting the Award must be

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construed as remitting it to the Arbitration of the Bengal Chamber of Commerce according to the contract of the parties. That is the first ground. Then the second ground is that the Arbitration Agreement between the parties still remains operative even where an order to remit the Award has been made by the Court under section 16 of the Arbitration Act, for what that section says is that the Court remits the Award or "any matter referred to arbitration." In other words, the reference to arbitration still exists. By Clause 13 of the contract in this case between the parties it was distinctly and expressly stipulated:—

> "All matters questions disputes differences and/or claims arising out of and/or concerning and/or in connection with and/or in consequence of or relating to this contract including matters relating to insurance and demurrage whether or not the obligations of either or both parties under this contract be subsisting at the time of such dispute and whether or not this contract has been terminated or purported to be terminated or completed shall be referred to the arbitration of the Bengal Chamber of Commerce and Industry under the rules of its Tribunal of Arbitration for the time being in force and according to such rules the arbitration shall be conducted and any Award made by the said Tribunal under this clause shall be final, binding and conclusive on the parties."

Therefore, it is plain to my mind that this order remitting the Award must be construed as an order remitting the Award to the Bengal Chamber of Commerce, but with this limitation that it should be by a Court "to be newly constituted consisting of persons different from those who made the Award." In fact, the Court by consent of parties directed that it should be by persons different from those who constituted the Court of Tribunal who made the previous Award. But when the consent order used the expression "newly constituted", it meant constituted according to the rules of the Bengal Chamber of Commerce arbitration. There was this further direction in the consent order that the Award had to be made within five months from the date of the receipt of the papers

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by the Bengal Chamber of Commerce. Except these two terms and conditions, there were no other terms and conditions imposed by that consent order of the Court. Therefore, it follows that this consent order does not impose any term saying that the rules of the Bengal Chamber of Commerce and Industry will not be applicable at all or that the conduct of such Arbitration will not be according to such rules of the Tribunal. As the rules of the Tribunal permit re-constitution of a Court, there was nothing wrong, illegal or invalid when the Bengal Chamber of Commerce re-constituted its Court on the ground that one of the Arbitrators at first selected was unwilling to act. That is the third ground. I, therefore, overrule the first objection.

The second point of Mr. Meyer is that the respondent was allowed to file a written statement before the Arbitrators on the 3rd January, 1955, but the applicant was not given any opportunity to file a reply to such written statement. This in fact I find is a misconception in the sense that this was not a written statement at all. In fact it was not signed by the respondent or by anyone else. What it purports to be is a typed list of points of argument in one page. That is how also it is described in the minutes of the Arbitrators and I entirely agree with such description. It certainly is not to my mind a written statement of the case of the plaintiff. Rule 11 of the rules of the Tribunal of Arbitration of the Bengal Chamber of Commerce makes it quite clear that:—

> "Parties within such time as may be directed by the Court shall prepare and submit to the Registrar in duplicate a written statement of their respective cases with copies of all relevant document and other evidence on which they rely. A copy of each party's case shall be given to the other party who shall respectively be entitled to put in a rejoinder thereto within such time as may be directed. Normally no more than one rejoinder shall be filed, but the Court shall have discretion if it thinks fit to allow more than one rejoinder on such terms as it may impose.

This rule makes it quite clear that it is only a "written statement of the respective cases" that is contemplated for the exchange between the parties. In fact the rule expressly says that a copy of "each party's case" shall be given to the other party. Now this list of typed points is not the respondent's case at all. I have carefully scanned this typed list of points and I find that each one of these points is taken from the statements and counter-statements already on record before the Arbitrators.

It is not the case of the applicant that they had no opportunity to see this typed list of points when it was submitted before the Arbitrators. What they complain is that they wanted to submit a written reply to that typed list. To that they were told by the Arbitrators that such a written reply was "not necessary". Anyone looking at this typed list would certainly say that no written reply was necessary because of the simple fact that all the points there mentioned had already appeared in the much fuller statements and counter-statements of the parties and had been duly agitated in such statements and counter-statements. In such circumstances I am bound to hold that there was no misconduct on the part of the Arbitrators in saying that no written reply was necessary, nor do I think that there was the slightest misconduct in their reception of the typed list. Unless there was legal misconduct the applicant cannot succeed in setting aside the award. Both on construction of rule 11 as above as well as on the merits of this point I hold that this typed list is not a written statement of a party's case at all, that it contained nothing new whatever and that whatever was contained there was fully stated in the respondent's different statements filed before the Arbitrators which the applicant had ample opportunities to answer and which in fact he did answer in full in his different statements before the Arbitrators. And finally I hold that the Arbitrators were right in saying that it was not necessary to file any written reply to such typed list of points. I hold, therefore, that there was no misconduct of the Arbitrators on this point. For these reasons I also overrule the second point of objection.

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The third point of objection taken by Mr. Meyer is that on the 3rd January, 1955 the applicant's representative Mr. P. Bhattacharjee was denied the right to cross-examine the respondent's representative. What happened on that day was that the applicant's representative wanted to cross-examine the respondent's representative. The Arbitrators wanted to know on what points he wished to cross-examine and wanted to see the nature of points or questions that the applicant's representative wanted to put. Thereupon the applicant's representative placed before the Arbitrators seven pages of typed questions with which he had come prepared beginning with such questions as, "What is your name?" and ending with the 52nd question as "I put it to you that your entire claims are absolutely false." These typed sheets although bearing no date on the top bear the date at the end of the last question which is the 52nd question and such date is 2-1-55. The Arbitrators looked at those questions and said according to the petitioner that "some of these questions were irrelevant and the majority of those questions were covered by the written submissions of the parties." On the 4th January, 1954 when the applicant's attorneys were recording this fact it was only said that the Arbitrators expressed their unwillingness to allow an opportunity to cross-examine the respondent's representative, but it was not said there that they did so on the ground that the questions were irrelevant or that they were covered by their written submissions already made by the parties.

On this fact Mr. Mayer has argued that the Arbitrators had violated the rules and principles of natural justice.

The doctrine of Arbitrators' legal misconduct has been so overworked in recent years that across that whole branch of case law on this point one finds the blazing trail of principles of natural justice. They are discussed and agitated in an atmosphere of complete unreality and divorced from the facts of each case. Somehow the obvious point is missed in most of such cases that when the parties agree to go to arbitration they stipulate not so much for vague principles of natural justice as for concrete principles of contractual justice according to the contracts of the parties and their specific stipulations. Where

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the contract of arbitration itself prescribes a private procedure of its own, then so long as such agreed private procedure is not against the laws and the statues of the land, then such agreed procedure must prevail over the notions and principles of natural justice. If the origin of the application of the principles of natural justice to arbitration procedure is remembered, then this confusion is easily avoided. When a contract or agreement for arbitration itself does not lay down any particular procedure for the conduct of the arbitration, the Courts have said that the arbitrators must follow the principles of natural justice which are no other than common sense standards of fairness and impartiality such as no party should be condemned unheard or without representation. It was necessary to do that because the arbitrators are not strict courts of law guided by the Civil procedure code and Evidence Act laying down massive details of procedure. In the absence of any procedure, prescribed either by Statute or by contract, the arbitrators must follow the principles of natural justice, or else there is nothing for the arbitrators to fall back npon to ensure fair adjudication. It will therefore be contrary to its origin and raison detre to apply natural justice where an available procedure is prescribed by contract or Statute. Parties are forced to depart from natural justice by Statute and similarly parties can agree to depart from natural justice. In fact they very often do for avoiding delay, expense and formality. In the case before me they have done so in unmistakeable terms.

For example here what the parties expressly agreed was not only to go to the arbitration of the Tribunal of Arbitrators of the Bengal Chamber of Commerce but also to have such arbitration according to the published and well-known Rules of arbitration of such Chamber of Commerce. Those Rules certainly are not models of natural justice nor were they intended to be so. Now the rules of arbitration here provide, for instance, "that no party shall without the permission of the Court be entitled to appear by counsel, attorney or other advocate or adviser." Denial of legal repusentation to a party does not savour of natural justice. Then again for instance the right to cross-examine which is a statutory right under the Indian Evidence Act in proceedings before a Court of law

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is not available in arbitration proceedings because of its express exclusion by S. 1 of that Statute. To found, therefore, a right to cross-examine on some vague principles of natural justice in such a context is to seek something which is not there. In fact rule 17 of the rules of the Tribunal of Arbitration of the Bengal Chamber of Commerce deals with evidence, and one looks there in vain for any right to cross-examine given to any party. In fact sub-rule (a) of rule 17 by saying that "the parties to the reference and any witness on their behalf shall submit to be examined by the court on oath or affirmation in relation to the matters in dispute" appears to indicate that it is the court which can put questions and what is known as the formal examination in chief, cross-examination and re-examination in a Court of law are conspicuous by their absence in such arbitration. In fact rule 15 provides that "the dispute will normally be decided by the Court on the written statements of the parties and oral evidence will not be taken, nor will the parties be entitled to appear or any formal hearing be held." This again is not a model of natural justice. In fact such Rule violates all principles of natural justice. To say that "oral evidence will not be taken" or even to say that "the parties will not be entitled to appear" is not natural justice and yet this is the artificial justice which the parties by voluntary agreement have chosen and therefore must be given effect to. In such a case with such explicit rules to invoke natural justice to override solemn contracts of parties is to do plain injustice. Towards the latter part of rule 15 it is further provided that "the Court shall have power however if it thinks fit to appoint a time and place for the hearing of the reference and to hear the oral evidence". Even then it is not said that any party will have or can claim any right to cross-evamine such evidence. Of course the Court or Tribunal can always permit a croos-examination if it so desires, because that is exactly what is provided by rule 17(d) when it says that the parties to the reference and any witness on their behalf "shall generally do all other things which during the proceedings and reference the Court may require". On an analysis of these rules of the Tribunal of Arbitration of the Bengal Chamber of Commerce I do not find they give to a party

any unqualified and unfettered legal right to cross-examine. If the arbitrators allow and require such cross-examination they can always permit a party to cross-examine under the ample powers contained in Rule 17(d).

Time has come to insist that enthusiasm for natural justice must always be tempered with due and proper regard for contractual justice to which the parties agree. Parties have the right by contract to provide for their own private forum of arbitration and also to provide for their private procedure. Where private procedure speaks in clear terms the voice of natural justice remains silent.

In this connection Mr. Meyer relied on a decision of the supreme Court in *Payya Vula, Vengamma* v. *Payya Vula Kessanna & Ors.*(1) Mr. Meyer particularly relied on the observations of Bhagwati J appearing at pages 123 and 124 of that Report where the learned Judge said:—

> "There is thus no doubt that the Arbitrator heard the defendant 1 in the absence of the plaintiff... No notice of this hearing was given by the Arbitrator to the plaintiff nor had she an opportunity of having the evidence of the defendent 1 taken in her presence so that she could suggest cross-examination or herself cross-examine the defendant 1 and also be able to find evidence, if she could, that would meet and answer the evidence given by the defendant 1, as was observed by Lord Langdale M. R. in *Harvey* v. *Shelton*(2).
>
> 'It is so ordinary a principle in the administration of justice that no party to a cause can be allowed to use any means whatsoever to influence the mind of the Judge, which means are not known to and capable of being met and resisted by the other party, that it is impossible for a moment not to see that this was an extremely indiscreet mode of proceding, to say the very least of it. It is contrary to every principle to allow of such a thing and

(1) (1958) S.C.R. 119.
(2) 7 Beavan 455 at p. 462.

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I wholly deny the difference which is alleged to exist between mercantile arbitrations and legal arbitratons. The first principles of justice must be equally applied in every case. Except in the few cases where exceptions are unavoidable, both sides must be heard and each in the presence of the other. In every case in which matters are litigated you must attend to the representations made on both sides, and you must not in the administration of justice, in whatever form, whether in the regularly constituted Courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decision of the Judge, which means are not known to the other side.'

"This case of *Harvey* v. *Shelton*(1) is the leading case on this point and it has been followed not only in England but in India (See *Ganesh Narayan Singh* v. *Malida Koer*(2)."

That case and the principles discussed there are not in my view attracted where parties have by their own choice agreed to a certain particular procedure and method of arbitration including a specific procedure and method of hearing the reference to arbitration. The decision of the Supreme Court did not relate to an arbitration of the Bengal Chamber of Commerce and the specific rules of arbitration that are found in the Rules of the Tribunal of Arbitration of the Bengal Chamber of Commerce which are expressly and specifically incorporated in the arbitration contract between the parties as in the presence case before me.

To my mind it is always unwise to assume that there is only one kind of arbitration. The procedure and method of arbitration subject of course to the Arbitration Act vary according to the contract of the parties. The contract of the parties in this case before me follow a wellknown pattern of arbitration. It is not a case of a private arbitrator whether mercantile or non-mercantile with no prescribed procedure for arbitration such as that which the Supreme Court was discuss-

(1) 7 Beavan 455 at p 462.
(2) 13 C L.J. 401 at p. 402.

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ing. It was plain that in the case before the Supreme Court it was a private Arbitrator with no rules of arbitration applying at all, and therefore the doctrine and the principles of natural justice applied. Indeed that is just the case where principles of natural justice must apply. There it was a case where a plaintiff filed a suit for arrears of maintenance and residence which was ultimately referred to a private individual as the sole arbitrator. No special procedure was there available according to agreed contract of parties to guide the arbitration procedure.

Realising that difficulty Mr. Meyer then fell back upon another decision of this Court in *Husein Ebrahim* v. *Kesardeo Kanoria & Ors.*(1). Here Mr. Meyer had the advantage of the fact that it was an award of the Bengal Chamber of Commerce which was successfully impeached. But then there what happened was something entirely different from the point for decision in this case before me. Indeed there the Arbitrators followed a procedure not permitted by the Rules of the Bengal Chamber of Commerce arbitration and therefore the principles of natural justice were applied. S. R. Das Gupta, J, who delivered judgment in that case observed at page 230:—

> "The Arbitrators obtained information from Gunny Traders Association without requiring any of the parties to call evidence on the points on which they wanted such informations. If the Arbitrators were so minded they could have asked the parties to call some person from the Gunny Traders Association to give evidence on the points on which informations were asked for or the Arbitrators might have themselves called such evidence. But to allow certain information to go in without calling evidence on those points and thereby depriving the parties of their right to cross-examine cannot, in my opinion, be justified. I am conscious of the fact that the strict rules of evidence are not applicable to arbitration proceedings, but there is a thing known as natural justice and it would be repugnant to the fundamental conception of natural justice

(1) (1953) 92 C.L.J. 224.

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that evidence should be allowed to go in without calling the person whose evidence is admitted, and without allowing the parties to test such evidence by cross-examination. In the premises as aforesaid I am of the opinion that the Arbitrators have been guilty of misconduct."

Now in that case the Arbitrators acted on certain informations from a third party without allowing any evidence by the parties themselves on those points on which the informations were obtained. The case here is different. Here no information was obtained from a third party. Here the respondent's representative gave evidence before the Arbitrators in the presence of the applicant's representative. Secondly that case did not decide at all the particular point which is before me, namely, whether natural justice can operate to override the terms of contractual justice. No body for a moment disputes the proposition that where there are no rules or no agreed procedure for conduct of the arbitration, principles and doctrines of natural justice must apply. In fact I have carefully gone through the report of that decision and I do not find that there was any reference or even arguments on the specific rules of the Bengal Chamber of Commerce on this point of right to cross-examine. The only rule there considered was rule 7 which has nothing to do with this particular point raised in the present application. The arbitrators in that case in fact did something wholly illegal, because they wrote a letter calling for information from the Gunny Traders Association and these informations were asked for without any reference to the parties. The Rules of the Bengal Chamber of Commerce did not permit such procedure. The learned Judge, therefore, at page 229 says, "In my opinion the Arbitrators were not justified in behaving in this manner." What was worse in that case was that the Arbitrators did not even disclose that letter. Here again Rules of the Bengal Chamber of Commerce do not permit secret evidence behind the back of parties and therefore principles of natural justice intervene to prevent such miscarriage of justice. In fact the parties did not even know the points on which the Arbitrators wanted the information, and that is why the learned Judge in the same page again says: "It was the duty of the Arbitrators if they

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wanted to act fairly in the matter to disclose the said letter dated the 5th November, 1951 as well." The facts of the present case before me can not only be distinguished from the facts of that case but they are also so entirely different.

Now what are the facts of the present case? A glance at the list of questions which were intended to be asked for in cross-examination will show that in this case at any rate there can be no question of misconduct. I shall show by an analysis of those questions that what are described as questions for cross-examination are nothing more than arguments. Arguments converted in question forms do not become cross-examination. Mr. Meyer in this connection relied on a few questions to show that it was material that his clients representative should have been allowed to put those questions. He relied on questions 6 and 7, questions 10 and 11, questions 13 to 18, questions 21 to 25, questions 28 and questions 42 to 44. It is, therefore, necessary to analyse these questions to see either their materiality or their relevance, for if they were either material or relevant, it is then only that the refusal to allow those questions to be put would amount to misconduct. I need only reiterate that the terms of the Arbitration Clause in this case are so wide that the Arbitrators had full jurisdiction to determine even the question of materiality or relevance or to allow or disallow questions in cross-examination, even if there was any right to cross-examine.

Now questions 6 and 7 are as follows:—

"Q. 6. You have stated in the Statements of Claim that it was duty of Messrs. D. L. Miller & Co., Ltd., to open the Letter of Credit?

Q. 7. Look at the contract and please find out whether there is any terms in the contract to the effect that it was the duty of Messrs. D. L. Miller & Co., Ltd., to open the letter of credit?"

In my view, these are only matters for argument. Ques-

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tion 6 only quotes what is in the Statement of Claim which is already before the Arbitrators. Question 7 refers to the contract which was also before the Arbitrators. Therefore, these questions whether D. L. Miller & Co., Ltd., had the duty to open letter of credit under the contract or not or the question whether there was any contradiction between the Statement of Claim and the terms of the contract on the question of whose duty it was to open the letter of credit, are only matters of argument and comment before the Arbitrators. Such argument would have been that although in the statement of claim it was alleged that the duty was cast on D. L. Miller & Co., Ltd., to open the letter of credit, that allegation was not supported by the terms of the contract which were before the Arbitrators. The refusal, therefore, by the Arbitrators to allow these questions to be put to the witness was not and could not be misconduct. In fact the arbitrators in my view drew the line correctly and rightly between argument and cross-examination.

Questions 10 and 11 are as follows:—

"Q. 10. You will also find that Clause 2, sub-clause 3 in terms of which the Buyers are to open a letter of credit has been struck out? On the other hand, it is written in place of clause 3 to the effect that "cash on delivery"?

Q. 11. Thus you will agree that as the Clause under which the Buyers were to open a letter of Credit has been struck out and it clearly provides that the payment will be made cash against delivery. It was not duty of the Buyers in the present case to open any letter of credit?"

These, again, are arguments. The terms of the contract were before the Arbitrators, and the effect of striking out Clause 2, sub-clause (3), was a matter of argument. So was the expression, "cash on delivery." It was, therefore, quite unnecessary to put any questions because they would not elicit

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any more facts than what the documents before the Arbitrators had already done. Therefore, there was or could be no misconduct on the part of the Arbitrators in refusing to allow these questions to be put in cross-examination. Here again the arbitrator drew the line rightly between argument and cross-examination.

Questions 13 to 18 refer to letters relating to extension of the time for delivery and the fact whether such letters contained any protest that because the Buyers had not opened a letter of credit, therefore, the extension of time had to be granted. All these letters referred to in these questions from 13 to 18 were before the Arbitrators and were fully discussed in the different statements and counter-statements before them. The questions intended to be asked were not really questions for cross-examination, but matters for argument. There can be and could be no prejudice, therefore, on the ground that such irrelevant and unnecessary questions were not allowed to be asked by the Arbitrators. Therefore, in my view there was no misconduct on the part of the Arbitrators in refusing to allow questions 13 to 18 to be put in cross-examination.

The next group of questions on which Mr. Meyer relied was from question 22 to question 25. They relate, first, to the admitted payment of Rs. 4,600/-. That fact already clearly appeared in the correspondence and in the different statements before the Arbitrators. The question that if it was the duty of the Buyers to open the letter of credit then why such payment was made to the Buyers, is, therefore, a question of argument which the applicant was free to make on the record already before the Arbitrators. These questions also intend to show that the respondent had no goods in Pakistan and had no means to perform the contract and, therefore, it was he who committed the breach of the contract. Now each one of those facts was already there in the different statements and counter-statements filed before the Arbitrators, and that charge had already been made and denied. It is, therefore, plain that questions 22 to 25 were irrelevant and wholly unnecessary questions; and I hold that the Arbitrators were right in refusing the applicant to put them in cross-

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examination, and in so refusing the Arbitrators were not and could not have been held to have been guilty of any legal misconduct at all.

The next question on which Mr. Meyer relied was question 28. That question is:—

"Q. 28. By your letter dated 9th June, 1953, you requested the Buyers to extend the time of delivery for one month. Up to that date you had no complaint against your buyers about the non-payment of the price of the portion of the goods already delivered by you?"

That, again, is a matter of argument because the letter of the 9th June, 1953 had already been placed before the Arbitrators and had been referred to in the different statements and counter-statements filed, and the fact clearly appeared that up to that date there was no complaint. It was, therefore, wholly unnecessary and irrelevant to put that question. Therefore, I hold that the Arbitrators were fully justified in refusing the applicant to put that question, and in so refusing, they cannot be held to have been guilty of any misconduct at all.

The last group of questions on which Mr. Meyer relied was from question 42 to question 44. These questions only refer to the Weight Notes and the different deliveries of different quantities of bales as shown therein. That, again, is a matter for argument because all these Weight Notes and the number of bales delivered were already placed before the Arbitrators in the different statements and counter-statements made by the parties. The applicant, therefore, could easily make his arguments on the basis of those Weight Notes, and these questions were not questions for cross-examination but matters for argument. I, therefore, hold that questions 42 to 44 were entirely irrelevant and unnecessary, and the Arbitrators were right in refusing to allow the applicant to put those questions in cross-examination, and in refusing to allow these questions to be put the Arbitrators, in my opinion, did not

commit any legal misconduct.

There are no other questions on which Mr. Meyer relied and which could have possibly created any prejudice to the applicant.

Those being the facts in this case and those being the specific questions, it is clear that the facts in the case of *Hossain Ibrahim* v. *Keshardeo Kanoria* (1), were entirely different from the facts in this case. This case is not concerned at all with the case of an Arbitrator trying to get informations behind the back of parties, a situation which was obvious and clear legal misconduct. I hold on the facts of this case that there was no legal misconduct on the part of the Arbitrators in refusing to allow those specific questions to be put in cross-examination. Each one of them, in my opinion, was wholly unnecessary. I repeat what was necessary or unnecessary was a matter for the Arbitrators to decide in this case and they were competent so to decide within the terms of the Arbitration Clause in this case, and it so happens that their decision appears to agree with mine.

For these reasons, I overrule Mr. Meyer's last point of objection to the Award.

In conclusion, it is necessary to refer to one other fact in this connection. It will be recalled that the order remitting the Award limited the time to five months from the receipt of the papers by the Bengal Chamber of Commerce within which they had to make this present Award and that such papers reached the Bengal Chamber of Commerce on the 4th or 5th August, 1954. The period of five months, therefore was about to expire on the 4th or 5th of January, 1955. The appearance of the applicant's representative at the meeting of the 3rd January, 1955, armed with seven typed pages of questions to be put in the cross-examination, was commented by Mr. Bhabra for the respondent as nothing else but an attempt somehow to make the time for making the Award expire, so that the Award could not be made any more and thus render

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the whole of this Arbitration infructuous. Mr. Bhabra therefore, says that all these high-sounding complaints of denial of justice and the denial of the right to cross-examine are really nothing but a cover for that motive because in fact all the questions for cross-examination when analysed show that they were wholly uncalled for on merits and were entirely unnecessary. Mr. Meyer in defending his client from this imputation said that after all it was the Arbitrators who had fixed this meeting on the 3rd January, so close to the date of expiry, and it was no fault of his client. Mr. Meyer is certainly justified in making that defence. But it is difficult to get away from the feeling that if all the questions that his client intended to put in cross-examination arose on the different statements and counter-statements already filed before the Arbitrators as early as the 3rd December, 1954, then his client could easily have written to say that he would take a little longer time for cross-examination and other purposes in which event I have no doubt the Arbitrators would have given still earlier dates for hearing. Having regard to my conclusions on the merits of the points of objection raised by Mr. Meyer, I do not think it is necessary for me to hold whether the applicant had the motive which the respondent counsel stated and shall leave the question of motive undetermined by recording the fact that such a charge was made in argument by the respondent.

For the reasons stated above, I hold that the Award is not invalid or void, and I dismiss the applicant's prayer to set aside the Award. The applicant will pay the costs.

Application dismissed.

S. K. R. C.

CRIMINAL REVISION.

Before Mr. Justice D. B. Mookerjee.

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Criminal Procedure Code—Sections 195(1) (*b*) (*c*), 200 *and* 476—*Proper procedure for trying an alleged offence under Section* 211/109 *of the Indian Penal Code.*

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Where, on a petition of complaint, a Magistrate (here the Additional Chief Presidency Magistrate, Calcutta) takes cognizance of an offence punishable under Section 211/109 of the Indian Penal Code, but in disregard of the provisions of Section 200 of the Code of Criminal Procedure, omits to examine the complainant, or in any event proceeds to try and determine the case himself in contravention of the provisions of Section 195/476 of the Code, which require him to forward the complaint to another Magistrate, the proceedings against the accused are illegal and must be quashed.

Application in Revision for quashing of proceedings against the accused.

The Judgment of the Court was as follows:—

Sasthi Charan Roy for the Petitioner.

Dhirendra Nath Guha Thakurata for the Opposite Party.

The material facts will appear from the Judgment:—

Debabrata Mookerjee, J.:—This is a Rule calling upon the Chief Presidency Magistrate, Calcutta, to show cause why certain proceedings pending against the Petitioner before the Additional Chief Presidency Magistrate, Calcutta, should not be quashed.

The facts briefly stated are that on the 14th of June, 1954, an information was lodged by the petitioner Rabindra Nath

* Criminal Revision Case No. 1305 of 1954.

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Das with the Jorasanko Police regarding the theft of a bycycle which had occurred on the day previous. In that information no one was mentioned as having been responsible for the theft. On the 22nd June, 1954 the bicycle in question was recovered from one Batuk Roy and it transpired that it had been pledged with him for a sum of Rs. 20/-. On the 2nd August, 1954 one Panchu Gopal Das was arrested for complicity in the offence charged on the identification of Batuk Roy. The owner of the bicycle is one Netaipada Das who identified it at a parade held in the Court of a Presidency Magistrate. On the 13th September, 1954 a chalan was submitted under Sec. 414 of the Indian Penal Code as the result of investigation by the Police against Panchu Gopal Das. On the date the chalan was submitted, a petition was filed by Panchu Gopal Das in the Court of the Additional Chief Presidency Magistrate in which various allegations were made against the investigating officer and the present petitioner. On receipt of this petition the learned Additional Chief Presidency Magistrate desisted from taking cognizance of the offence mentioned in chalan and directed an enquiry to be held by Mr. Sarbadhikary, another Presidency Magistrate into the petition submitted by Panchu Gopal Das. Before the last named Magistrate as many as six witnesses were examined by Panchu Gopal Das, and in these Proceedings the petitioner was not represented. The enquiring Magistrate made a report declaring that the petitioner's information to the Police was false and recommended to the Additional Chief Presidency Magistrate discharge of Panchu Gopal Das. The inquiring Magistrate further advised that there should be inquiry into the offence under section 211/109 of the Indian Penal Code which appeared to have been committed by the petitioner and one Ganesh Chandra Gossain.

On the 27th September, 1954, the learned Additional Chief Presidency Magistrate read the report submitted by the enquiring Magistrate and refused to accept the chalan submitted by the investigating officer. He further ordered the discharge of Panchu Gopal Das on the ground of want of evidence against him. By the same order the learned Magistrate directed issue of notices on the petitioner and the aforesaid Ganesh Gossain

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calling upon them to show cause why a complaint should not be made against them for committing an offence under section 211/109 of the Indian Penal Code. On the 1st November 1954 the petitioner showed cause in obedience to that order and the case was fixed for hearing on the 11th November, 1954 on which date the learned Magistrate after having heard the Public Prosecutor in the matter whom he had directed by an earlier order to appear in the case, fixed the 1st December, 1954 for the hearing of the matter. Thereafter the petitioner applied to this Court and obtained the present Rule.

It is contended on behalf of the Petitioner that the Procedure followed by the learned Additional Chief Presidency Magistrate is unknown to law, and consequently, the order made by him which had the effect of putting the petitioner and another upon trial under section 211/109 of the Indian Penal Code is wholly unsustainable. It is said the cause shown by the Petitioner against his prosecution was over-ruled and the case against him was fixed for hearing straight away.

There cannot be any doubt that the Additional Chief Presidency Magistrate took action against the petitioner and the aforesaid Ganesh Gossain upon the petition which was filed by Panchu Gopal Das on the 13th September, 1954, the date on which the chalan against the latter had been submitted by the Police. Directly this petition was received, the learned Magistrate stayed his hands as respects the taking of cognizance of the offence mentioned in the chalan and thought it expedient to direct a "judicial" inquiry in to the petition submitted by Panchu Gopal Das. These challan to be the only facts upon which the Additional Chief Presidency Magistrate proceeded to direct the inquiry.

It is indeed extremely difficult to understand what exactly was the Procedure which the learned Additional Chief Presidency Magistrate followed or purported to follow in the present case. When the chalan was submitted it was perfectly open to the Magistrate to refuse to take cognizance of the offence mentioned in the chalan. A Magistrate cannot certainly be held bound by a Police report. But then when he took into consideration simultaneously the petition filed by Panchu

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Gopal Das and took action upon it by directing a judicial enquiry to be held by another Presidency Magistrate, treated Panchu Gopal Das's petition as a petition of complaint. The Magistrate was quite entitled to do that; but if he so chose to treat it as a complain bound by the Procedure indicated in Sec. 200 of the Code which obliged him to examine the complaint. The learned Magistrate did nothing of the kind straight away he directed a judicial inquiry to be held into Panchu Gopal Das's complaint.

The judicial inquiry thus directed does not appear to have been limited strictly to the complaint which was made by Panchu Gopal Das; it extended as it was found to proving facts and circumstances suggestive of the falsity of the information which the petitioner had lodged with the Jorasanko Police on the 14th June, 1954. Whatever the nature of the enquiry might have been, the enquiring Magistrate, as has been observed already, recommended another enquiry to be made into the offence under section 211/109 of the Indian Penal Code alleged to have been committed by the present petitioner. The learned Additional Chief Presidency Magistrate on receipt of the report of the enquiring Magistrate declined to take cognizance of the chalan and called upon the petitioner and another to show cause why they should not be proceeded against for having committed an offence under Section 211/109 of the Indian Penal Code.

If the petition filed by Panchu Gopal Das, on the 13th September, 1954 is to be treated as a complaint, as it must be so treated, then the Additional Chief Presidency Magistrate clearly contravened the provisions of Section 200 of the Code of Criminal Procedure. Alternatively, if the petition of Panchu Gopal Das is to be ignored, the learned Additional Chief Presidency Magistrate by his order dated 27th September, 1954 called upon the petitioner to show cause why he should not be prosecuted for having committed an offence under Section 211/109 of the Indian Penal Code. He was, therefore, in the latter case obliged to follow the provisions of Section 195(1)(b) of the Code of Criminal Procedure which provides that no court shall take cognizance of an offence punishable under Section 211 when such an offence is alleged to have been committed in or in relation to any proceeding

in court except on the complaint in writing of such court or of some other court to which such court is subordinate. Section 476 of the Code prescribes the procedure to be followed in cases covered by Section 195 (1) (b) and (c) of the Code. It is provided by Section 476 that when a Criminal Court is whether an application made to it in this behalf or otherwise, of opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in Section 195(1) (b) or (c) which appears to have been committed in or in relation to a proceeding in that Court, such Court, may, after such preliminary inquiry if any, as it thinks necessary, record a finding to that effect and make a complaint in writing signed by the presiding officer of the Court and shall forward the same to a Magistrate of the First class having jurisdiction. The section further makes it clear that for the purpose of that section a Presidency Magistrate is to be deemed a Magistrate of the First class.

If the learned Additional Chief Presidency Magistrate intended to Proceed against the petitioner and the aforesaid Ganesh Gossain as having been responsible for commission of an offence under Section 211/109 of the Indian Penal Code, it was his clear duty to follow the Procedure prescribed under Section 476 of the Code, he should have preferred a complaint and forwarded it to another Magistrate.

The learned Additional Chief Presidency Magistrate appears to have completely ignored the provisions to which I have just referred. When the petitioner showed cause he at first directed the matter to be put up on the 11th November, 1954 and asked the Public Prosecutor to take up the matter. The Public Prosecutor was heard at length in the matter. Presumably the Magistrate was not satisfied with the cause shown, noted on the order sheet that the parties were ready and fixed the 1st December, 1954 for the hearing of the case.

There can be no doubt whatever that the learned Magistrate intended to Proceed and did proceed with the case himself. This is, to say the least, a Procedure which is clearly against the provisions of Section 195/476 of Code of Criminal Procedure. It was his clear duty to forward a complaint to another Presidency Magistrate; but instead of that he fixed

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the case for hearing. The word "hearing" admits and of no equivocation the petitioners definites case which remains uncontradicted is that the learned Magistrate proceeded to try and determine the issue of guilt or innocence of the petitioner. This is clearly unwarranted and the procedure involved a a complete disregard of the provisions of the court.

If the petitioner of Panchu Gopal Das filed before the Additional Chief Presidency Magistrate on the 13th September, 1954 is to be treated as a petition of complaint, the Magistrate must be held to have failed to follow the provisions of the law by omitting to examine the complainant under Section 200 of the Code; and even if this petition is ignored which indeed it is difficult to do and the matter be taken to have originated somehow with the report submitted by the enquiring Magistrate, even then the Additional Chief Presidency Magistrate disobeyed the provisions of the law by making so to say an informal complaint to himself and then proceeding to try it out.

It is indeed to be regretted that the learned Additional Chief Presidency Magistrate should have evinced such complete disregard of the provisions of law and evolved a procedure of his own.

The result, therefore, is that the proceedings pending against the petitioner before the Additional Chief Presidency Magistrate must be quashed. The rule is accordingly made absolute.

Rule absolute.

R. N. C.

ORIGINAL CIVIL

Before Mr. Justice P. B. Mukharji.

KANHAYALAL DUGAR
V.
ASHKARAM KISHANLAL*

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April, 26

Arbitration—Section 28 of the Indian Arbitration Act— Extension of time for making the award when can be made.

The Court can enlarge the time for making the award either before or even after the time for making the award has expired.

The Court can enlarge the time either before the award has actually been made or even after the award has been made. The Court can grant even more than one extension of time. What is necessary for the Court in its proper exercise of discretion is to consider a case to be fit before it enlarges time. The policy of the law should, however, be always a consideration and that policy is that arbitrations should not be unduly prolonged.

The Judgment of the Court was as follows:—

D. C. Sethia and *B. L. Vayas* for the Applicant.

A. C. Bhabra for the Respondent.

The material facts will appear from the Judgment.

P. B. Mukarji, J.:—This is an application by Kanhayalal Dugar for extending the time for making the award of the Tribunal of Arbitration of the Bengal Chamber of Commerce in Case No. 1001 of 1954, made on the 11th August, 1955 after the expiry of the time for making the same under clause (3) of the First Schedule of Arbitration Act 1940.

The dispute has a rather chequered history. It relates to a contract for sale of 2,000 maunds of jute on the 23rd April, 1952. There were quarrels between the parties about the manner of delivery and the dispute was referred to the

* Re: Award Case No. 261 of 1955.

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Bengal Chamber of Commerce who made an award on the 10th February, 1953. Thereafter an application was made by the respondent for setting aside that award and the award was ultimately declared a nullity on the 16th August, 1953. That was the fate of the first award. The matter was again referred to the Arbitration of the Bengal Chamber of Commerce. The Court was constituted at first on the 29th September, 1954 with Mr. Cornish and Mr. Kedar Nath Bajoria as arbitrators. This Court of the Arbitrators entered on the reference on the 15th October, 1954. The buyer-respondent filed his counter-statement objecting that the reference was bad and there was no proper reference and that no award should be made. On the 7th February, 1955 Mr. Cornish having gone out of India, Mr. Adamson was appointed in his place under the Rules of the Bengal Chamber of Commerce. On the 15th February, 1955 the re-constituted Court entered on the reference. Thereafter a meeting was held of the parties before the Arbitrators on the 11th March, 1955 and the arbitration proceeded. But soon thereafter on the 28th March, 1955 the respondent applied to revoke the authority of the Chamber and obtained an interim order for stay from this court. The arbitration was thereafter stayed until the 13th June, 1955 when the respondent's application for revocation of authority of the Chamber of Commerce was dismissed. The result was that the time to make the award expired on the 15th June, 1955 if four months is taken from 15th February, 1955 when the Court of Arbitrators was re-constituted. In fact, the award was thereafter made on the 11th August, 1955. It is this award in respect of which extension of time is now sought on this application. Before the award was made there was a meeting on the 27th July, 1955 which was attended by the parties.

Court's powers under section 28 to extend time are entirely discretionary and are not limited. Section 28 of the Arbitration Act, 1940 provides:—

> "The Court may if it things fit whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award."

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The Court can enlarge the time for making the award either before or even after the time for making the award has expired. The Court can enlarge this time either before the award has actually been made or even after the award has been made. The court can grant even more than one extension of time. What is necessary for this Court in its proper exercise of discretion is to consider a case to be fit before it enlarges time. The policy of the law should however be always a consideration and that policy is that arbitrations should not be unduly prolonged and for that purpose the First schedule clause (3) of the Arbitration Act provides a period of four months.

The outstanding reason for which I shall extend the time in this case is that the Arbitrators were here prevented from making the award within four months by an order of stay from this Court. If the period of stay order of this Court for two months and a half from 28th March, 1955 to 13th June, 1955 is excluded, then the four months would expire by the end of August, 1955. The award, however, was made before then, having been made on the 11th August, 1955. I should, therefore, think that this is a fit and proper case where the time certainly should be extended at least to the date when the award was made on the ground that this Court by its own order had stayed the progress of the operation of the arbitration proceedings, and this Court at any rate should give the benefit of the time that the Arbitrators lost during that order of stay. That is the first ground on which I feel inclined that the time should be enlarged in this case.

The second ground is that even after the time expired according to the respondent on the 15th June, 1955, the respondent appeared before the Arbitrators at the meeting held on the 27th July, 1955 without protest that the time for making the award had already expired. I read the conduct of the respondent in appearing before the Arbitrator even after the time for making the award had expired without any objection on the ground of time, as a further consideration in favour of enlarging the time for the award.

The third ground on which the time in this case should be

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extended is that there is no objection to the merits of the award or even to the conduct of the arbitrators. It is a persuasive consideration before the Court that after all the time, expense and trouble in going to arbitration and actually having the award, regarding which there is no meritorious objection, it is proper to enlarge the time and make the award, the fruit of so much time, labour and expense, effective and not to frustrate it by refusing time.

I am therefore satisfied that the court should exercise its discretion to enlarge the time for the award in this case on each of these three grounds. As there is first no fault of the arbitrators that the award in this case could not be made within the period of four months under clause (3) of Schedule I of the Arbitration Act 1940, secondly the respondent appeared before the Arbitrators after the expiry of time, without taking any objection as to time, thirdly, as there is no objection to the merits of the Award and fourthly as the Court's powers are discretionary under section 28 of the Arbitration Act in the matter of enlarging the time for making the award, I enlarge the time in this case until the 11th August, 1955 when the award was made in this case.

There will, therefore be an order in terms of clause (a) of the Chamber Summons. I, however, make no order as to costs of this application. The application is certified for counsel. There will also be judgment upon award with interest and costs.

Palit & Mullik: Solicitors for the Applicant.
B. M. Bagaria & Co.: Solicitors for the Respondent.

S.K.R.C.

Application allowed.

APPELLATE CIVIL.

Before Mr. Justice P. N. Mookerjee and
Mr. Justice Renupada Mukherjee.

NALINI NATH MITRA & ORS.
V.
BEPIN BEHARI DAS & ORS.*

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April, 27.

Suit for specific performance of contract—What the Plaintiff must prove in order to succeed—Title suit and Rent suit tried at the same time—Appeal from the former but not from the latter—Decision in the latter if resjudicata in the appeal—Res Judicata—Ingredients of.

In a suit for specific performance of contract the falsity of the defence story does not necessarily establish the plaintiff's story which must stand or fall on its own merits, independently of any inherent weakness in the defence case.

Where the plaintiff failed to pay the balance of the selami to the defendants under the contract within the stipulated time, it must be held that the plaintiff was unable to perform his part of the contract and the defendants were entitled to treat the contract as cancelled.

Quaere: If two suits involving some common issues are tried together and the unsuccessful party against whom the common issues are decided prefers an appeal from one of the suits but not from the decree passed against him in the other suit,—whether the latter decision would operate as *res judicata* and stand as a bar to the prosecution of the appeal.

Divergent views pointed out. Where the decree in the rent suit was not made subject to or dependent on the result of any appeal which might be preferred from the decree in the title suit, it cannot be said that the court which passed the decree in the rent suit did not attach any finality to it.

Held (on an examination of the materials on record) that the matter which was directly and substantially in issue in the title suit was not directly and substantially in issue in the rent suit, and as such the rule of *res judicata* did not apply in the present case.

Suit for Specific Performance of an agreement for execution of a Dar Mourashi Pattah by the defendants in favour of the plaintiff.

The material facts will appear from the judgment.

* Appeal from Original Decree No. 20 of 1951 against the decree of Sri N. M. Sarkar, Sub-Judge of Additional Court of Zillah Hooghly dated the 15-7-50 in T.A. Suit No. 15 of 1949.

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Nirmal Ch. Chakravortty and *Joy Gopal Ghose* for the Appellants.

Apurbadhan Mukherjee and *Tarak Nath Roy* for the Respondents.

The judgment of the court was as follows:—

Renupada Mukherji, J.:—This appeal arises out of a suit for specific performance of an agreement for execution of a Dar Mourashi Pattah by the defendants in favour of the plaintiff.

This litigation lay in its embryo in a deed of agreement alleged to have been executed by one Sailendra Nath Mitra, predecessor-in-interest of the defendants, in favour of plaintiff Bepin Behari Das as early as March 7, 1921. Admittedly, the plaintiff took settlement of 10 bighas of land in village Konnagar for 25 years at an annual rent of Rs. 300/- per the first 12 years and thereafter at Rs. 450/- per annum for the next 13 years. The relevant pattah and kabuliyat were executed by the two parties on August 6, 1918 (21st Saravan 1325 B.S.). The term of the lease was to expire with the end of the Bengali year 1348. The suit land is used for the purpose of manufacture of bricks and tiles and it is admitted that the plaintiff's predecessors had been in possession of the same at least from 1289 B.S. The plaintiff alleged in his plaint that during the subsistence of the lease Sailendra Nath Mitra executed an agreement in favour of Bepin Behari Das agreeing that either Bepin or his successor-in-interest will be entitled to take a permanent lease of the demised land on payment of Rs. 5,000/- at least as selami and an annual rent of Rs. 500/- if he made such an offer either within the period of the lease or immediately after the expiry of the period. The plaintiff's case in the plaint was that Sailendra Nath Mitra died early in 1348 B.S. and before the expiry of that year he approached defendant No. 1, Nalini Nath Mitra, who acted as Karta of the joint family constituted by the defendants who are the heirs of Sailendra Nath Mitra, and offered to take permanent lease of the demised land after some re-

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duction of the selami and the rent because of the reduction of the area of the holding from 10 bighas to 6 bighas. The plaintiff further alleged in his plaint that after some negotiations the parties came to a settlement and Nalini Nath Mitra agreed in the first week of Aswin 1349 B.S. that permanent lease of the disputed land would be given on payment of a selami of Rs. 4,250/- and at an annual rental of Rs. 470/- The plaintiff further averred that in pursuance of this agreement he deposited Rs. 2,500/- with the defendants towards the selami and also paid the rent for 1349 B.S. at Rs. 450/- which amount had been fixed by the parties as rent for 1349 B.S. The time for executing the lease was fixed at one year from the date of the agreement but the defendants later on resiled from the contract and did not execute the necessary lease although requested in that behalf on several occasions by the plaintiff. Hence the present suit was instituted by the plaintiff.

The suit was contested in the court below by the defendants. Their defence in substance was that they were not aware that Sailendra Nath Mitra had executed any agreement in favour of the plaintiff as alleged by the latter. It was further their case that after the expiry of the term of the lease the plaintiff approached defendant No. 1 and proposed to take Dar Mokarari settlement of the disputed land from him. This was not acceded to by defendant No. 1 and the plaintiff finally agreed to take settlement of the disputed land on payment of a selami of Rs. 5,000/- and at a rent of Rs. 700/- per year for a period of nine years. In pursuance of this agreement the plaintiff paid Rs. 2,500/- by instalments on account of selami, but as the balance of the amount was not paid inspite of repeated demands the contract stood cancelled.

The learned Subordinate Judge accepted the plaintiff's version of the agreement and negatived the defence of the defendants. He decreed the suit and so defendants Nos. 1 and 2 of the court below have preferred this appeal.

The only point which requires decision in this appeal is whether there was an agreement between the parties that per-

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manent lease of the disputed land would be given to the respondent according to the terms and conditions mentioned in the plaint and whether the plaintiff respondent is entitled to get that contract specifically enforced.

Mr. Chakravartty, appearing on behalf of the two appellants, contended that the learned Subordinate Judge was wrong in rejecting the appellant's version of the contract because the case depends mainly upon a consideration of oral evidence of the parties themselves and the court below has itself observed that the oral evidence of appellant Nalini Nath Mitra, D.W.1, is to be preferred to the evidence of the plaintiff respondent. The trial court has not however, given an unconditional preference to the evidence of Nalini. It has observed, —and in our opinion rightly,—that the value of the oral evidence adduced by the parties should be gauged and assessed in the light of the agreement, marked Ext. 5. The authenticity of that document was seriously mooted by the appellants in the court below. We are, however, satisfied from the evidence adduced on behalf of the respondent that this document was executed by Sailendra Nath Mitra and there is no reason whatsoever for coming to a conclusion that the document is a forged one. In that document it was agreed by Sailendra Nath Mitra that on the expiry of the term of the lease with the end of the Bengali year 1348 or immediately thereafter, lessee Bepin Behari Das would be entitled to take permanent lease of the disputed land on payment of a selami of Rs. 5,000/- at least and at an annual rental of Rs. 500/-. This document was in the possession of the plaintiff respondent and it may be presumed that he was conversant with its terms. It is not at all probable that with this document in his possession the respondent would agree to take settlement of the disputed land for a period of nine years only at a rent much higher than what was stipulated in the agreement although there had been a substantial reduction in the area of the demised land during the period of the lease. In these circumstances the court below was justified in rejecting the appellants' version of the agreement.

That, however, would not enable the respondent to get a decree straight away. Mr. Mukherjee, appearing on

behalf of the respondent, contended that the court below had two conflicting versions of the agreement before it, and if it considered the defendants' version to be unworthy of acceptance then the plaintiff's version should be accepted as a matter of course. In our opinion, this argument cannot be accepted because in a suit for specific performance of contract the falsity of the defence story does not necessarily establish the truth of the plaintiff's story which must stand or fall on its own merits, independently of any inherent weakness in the defence case. So we shall have to examine whether the plaintiff respondent has succeeded in establishing his claim to get a decree for specific performance of the contract set forth in the plaint.

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The court below has held that the contract setforth in the plaint has been proved. For the present we may assume that this is so, although we must observe that the evidence on which the court has arrived at this finding is rather insufficient and open to serious criticism. The main evidence on this part of the case is evidence of plaintiff Bipin Behari Das, P.W.1, and his son Ganesh Chandra Das, P.W.4, both of whom are highly interested in the result of this case. Of course, there is the agreement of 1921 executed by Sailendra Nath Mitra (Ext. 5). But then although the agreement purported to give the respondent a period of 22 or 23 years for taking a permanent lease on payment of a selami of Rs. 5,000/- and at a rental of Rs. 500/- per year, the respondent did not think it feasible or proper to pay the money and to take the lease within that period. The previous lease expired with the end of 1348 B.S. Sailendra Nath Mitra died in the early part of 1348 B.S. It was after his death that the plaintiff approached Nalini for taking settlement of the disputed land on payment of a reduced selami and at a rent lower than what had been stipulated in the agreement of 1921. We shall asume for the present that Nalini agreed to give a permanent settlement of the disputed land on payment of a selami of Rs. 4,250/- and at a rent of Rs. 470/- per annum and shall address ourselves to the question whether at all material times the respondent was ready and willing to perform his part of the contract.

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According to the case of the plaintiff, the contract was finalised in the first week of Aswin 1349 B.S. (latter part of September 1942). It has been stated in paragraph 8 of the plaint that necessary documents were to be executed within a year of the date of the conclusion of the contract and the balance of selami was also to be paid within that time.

We shall now refer to some receipts for the purpose of showing how much selami was actually paid by the plaintiff and within what period. The receipt, marked Ext. 2-B, would show that a sum of Rs. 1,000/- was paid on September 25, 1942, which is presumably the date of the alleged contract. Another receipt, marked Ext. 2-C, would show that a sum of Rs. 500/- was paid on October 9, 1942. All these amounts were kept in deposit by the landlords. Reference may now be made to a letter addressed by Nalini Mitra to respondent Bepin Behari Das on October 29, 1942 (Ext. 3). In this letter Nalini made a premptory demand for the selami money from the respondent. There are also some statements in the letter which would throw a good deal of doubt on the conclusive nature of the contract. However, we are not discussing that question as it is unnecessary for us to discuss the same. Suffice it to say that Nalini was making insistent demand for selami money. It seems that in response to this letter the plaintiff deposited another sum of Rs. 500/- on October 31, 1942 and a further sum of Rs. 500/- on November 14, 1942 [vide Ex. 2(d) and Ex. 2(c)]. The total amount of selami paid upto November 14, 1942, was thus Rs. 2,500/-. The facts and circumstances of this case would disclose that the respondent did not pay the balance of the selami, whatever might have been the amount of the balance, within the time stipulated, namely, within one year from the first week of Aswin, 1349 B.S. Instead of paying the entire balance which was due after Nalini had sent his letter dated October 29, 1942, the plaintiff could manage to pay only Rs. 1,000/- in two instalments and the admitted balance of Rs. 1,750/- remained due. This amount was not paid within the time stipulated. We must, therefore, hold that the respondent was not in a position to perform his part of the contract and so the appellants were entitled to treat the contract as cancelled. Of course they have alleged an altogether separate kind of contract. But that

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will not matter so far as the decision of this suit is concerned. We are of opinion that the respondent was unable to perform his part of the contract and so the suit for specific performance of the contract should have been dismissed by the court below on that ground.

Mr. Mukherjee, appearing on behalf of the respondent, raised a new contention in this court that the appeal must be considered to be barred by res-judicata. This contention arises in the following way. During the pendency of the suit for specific performance of the contract in the trial court which shall henceforth be called the title suit, the two appellants and their co-sharers, the pro-forma respondents of this appeal, instituted a suit, namely, Rent suit No. 3 of 1950, for recovery of arrears of rent against the plaintiff. Rent for the disputed land was claimed at Rs. 700/- per year for the years 1353 to 1356 B.S. (vide plaint Ext. 11). The defence of the plaintiff respondent who was also the sole defendant in the Rent suit was that the rent of the holding was Rs. 470/- per year. The Rent suit was decreed at the latter rate on July 25, 1950, on the basis of the judgment under appeal. It may be mentioned here that the Title suit of Bepin Behari Das had been decreed ten days earlier on July 15, 1950, and the present appeal from that decree was filed on November 20, 1950. In this court Mr. Mukherjee filed an application for putting in some documents by way of additional evidence. Those documents include the judgment and decree passed in the rent suit mentioned above. The appellants of course objected to the reception of any additional evidence in this court on the ground that they would be prejudiced thereby.

In our judgment there would be no prejudice if the judgment and decree of the rent suit are admitted by way of additional evidence. So we accept them as such and they are marked High Court Exts. 1 and 2. We are not inclined to receive the remaining documents as additional evidence as the appellants will be highly prejudiced if they are accepted as evidence at this stage of the proceedings.

It is an admitted fact that no appeal was preferred by the appellants and their co-sharers from the decree passed in the rent suit. Mr. Mukherjee contended that no appeal

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having been taken by the appellants from the decision made in the rent suit and the same matter which was in controversy in Bepin Behari Das's title suit having been heard and decided in the rent suit, the latter decision would operate as res judicata and the question canvassed in this appeal must be taken to have been concluded once for all between the parties. In support of this contention Mr. Mukherjee relied on two decisions of this court, one of which is reported in *Gangadhar* v. *Sekali Telini and others* (1) and another in *Isup Ali* v. *Gour Chandra Deb* (2). These two cases seem to be authority for the proposition that where two suits involving some common issues are tried together and the unsuccessful party against whom the common issues are decided prefers an appeal from the decree passed in one of the suits but not from the decree passed against him in the other suit, the latter decision would stand as a bar against the prosecution of the appeal. In this connection Mr. Mukherjee also cited another case reported in *Ganga Prasanna Mukhopadhaya* v. *Kumar Brahma Niranjan Chakravarty* (3) where in the case reported in *Isup Ali's case* (2) has been quoted with approval. On the authority of these cases Mr. Mukherjee contended that in the present case the inter partes decision in the rent suit which has not been challenged in appeal must be taken to be a bar against the prosecution of the appeal.

As regards the contention of Mr. Mukherjee we may mention that the view of this court on the question whether a decision, unchallenged in appeal under circumstances mentioned above, would operate as res-judicata is by no means uniform and as an instance we may only mention a comparatively recent case reported in *Bahadur Singh Singhee* v. *Rani Jyatirupa Debi* (4). It would have become necessary for us either to reconsile these divergent opinions or to make a reference to the Full Bench if we were satisfied that all the essential ingredients for bringing into operation the rule of res-judicata were present in this case. But before we take up this question we must dispose of a contention put forth by Mr. Chakravartty on behalf of the appellants that the judgment in the rent suit is not a final

(1) (1921) 34 C.L.J. 281.
(2) (1922) 37 C.L.J. 184.
(3) (1942) 46 C.W.N. 702.
(4) (1936) 40 C.W.N. 1176.

judgment and so it cannot operate as resjudicata in this appeal.

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In support of his contention that the decree passed in the rent suit is not a final decree Mr. Chakravartty drew our attention to the following lines in the judgment passed in the rent suit:—

> "The judgment of that court is Ext. A in this suit. That decision must be taken as conclusive so long as it stands. I would, therefore, decide this point in favour of the defendants."

Mr. Chakravartty contended that the court which tried the rent suit did not attach any finality to its own judgment but made its validity conditional to the final decision of the title suit. He, therefore, argued that the decision in the rent suit should not be regarded as a final decision. In support of this contention Mr. Chakravartty relied on the Privy Council decision in the case of *Kumar Chandra Singh Dudhuria* v. *Midnapore Zemindary Co., Ltd.*, (1) where it has been held that a subsequent decision, which is expressly made subject to the final decision of a Privy Council appeal pending between the parties, is not a final decision within the meaning of Sec. 11 of the Code of Civil Procedure. In our judgment the present case cannot be covered by the authority of the Privy Council Case cited by the learned Advocate for the appellants, because in the latter case the decision which was sought to be put forward as founding a claim of res-judicata was made expressly subject to the final decision of a pending Privy Council appeal. In the present case, no appeal was pending from the decree of the title suit at the time the rent suit was heard and decreed. The decree in the rent suit was not made subject to or dependent on the result of any appeal which might be preferred from the decree of the title suit. So it cannot be said that the court which passed the decree in the rent suit did not attach any finality to it. In our judgment in the absence of any sure indication that the decree in the rent suit was made dependent on the final decision of the title suit, it cannot be safely said that the

(1) (1941) L.R. 69 I.A. 51.

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decree in the rent suit was not a final decree.

Reverting now to the question whether all the ingredients necessary for attracting the principle of res-judicata were present, we may say, after a full examination of the materials on record, that the respondent has failed to satisfy us that all the ingredients necessary for the application of the rule of res-judicata are present here. We are by no means satisfied that the matter which was directly and substantially in issue in the title suit was also directly and substantially in issue in the rent suit. In this connection we may say that the respondent who relied on res-judicata in this appeal failed to place before us the written statement which was filed by him in the rent suit. In the absence of the written statement it is impossible for us to make any conjecture as to what exactly was the case raised by the respondent in the rent suit. Then again, the matter which was substantially in issue in the title suit was the contract alleged by the present respondent and an issue to that effect was specifically framed in the title suit. In the rent suit the only material point for decision framed by the court was "What is the actual rent of the land?" The parties did not adduce any evidence in the rent suit and the court decreed the suit in part holding that the rent of the disputed land was Rs. 470/- per year. In these circumstances it is impossible to say that the whole contract which was the subject matter of an issue in the title suit was also put in issue in the rent suit. That being the case, one of the essential ingredients for the application of the rule of res-judicata is wanting here and we are not prepared to accept the contention of Mr. Mukherjee that the present appeal is barred by res-judicata.

In the result, we are of opinion that the appeal should be allowed and the plaintiff's suit for specific performance of the contract must be dismissed. At the same time, we are of opinion that the amount of selami namely, Rs. 2,500/-, which has admittedly been paid by the respondent and received by the appellants must be refunded and a direction to that effect should be given in the decree.

The appeal is, therefore, allowed and the judgment and

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decree of the court below are hereby vacated. The claim of the plaintiff for specific performance of the contract hereby stands dismissed. But the plaintiff will get a decree against all the defendants for refund of the selami money of Rs. 2,500/-. If this amount be not paid within two months of this date, the plaintiff respondent will be entitled to recover the same by executing the decree.

In the circumstances of this case, we direct that both parties will bear their own costs throughout.

P. N. Mookerjee, J.—I agree in the order, proposed by my learned brother.

Mr. Mukherjee, appearing for the plaintiff respondent, contended that upon the cases of the two parties, there was admittedly some agreement for lease, although the parties differed as to the nature and terms of this agreement and, accordingly, upon the defendants failure to establish their case on the point, the plaintiff's version ought to be accepted. In the circumstances of this case, I am prepared to accept this argument, but even then, upon the plaintiff's own case, the selami money under the said agreement for lease had—to be paid within a year from the date of the agreement, that is, within 8th Aswin, 1350 B.S. and that, admittedly was not done. On the materials, produced by the plaintiff himself and in the light of the dependant's letter, Ext. 3, these can be no doubt that this payment of the selami money within one year was a vital term of the alleged agreement which was intendeed to be performed by the parties within the stipulated time of one year from the date of agreement namely 8th Aswin, 1349 B.S., so that the document of lease might be executed and the transaction completed within that period. This is confirmed by the circumstances of the case and the conduct of the parties themselves. In this context, the above stipulated time for payment of the selami money must be regarded as of the essence of the contract and, the plaintiff having failed to perform this essential part of the contract and his explanation for his failure in that behalf uttery un-

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satisfactory and wholly unworthy of acceptance, he will certainly not be entitled to specific performance of the disputed agreement for lease. On the merits, therefore, his suit for specific performance must fail.

On the question of additional evidence, sought to be adduced in this court, I was not inclined to admit any of the documents tendered for the purpose, into evidence. This question was mooted almost at the conclusion of the arguments and, even then, reference was made only to the decision in the rent suit. The actual application, however, included various other documents. There was no explanation why this prayer for reception of additional evidence could not be made earlier and, in the circumstances of this case, I was reluctant to grant this indulgence to the defaulting respondent, particularly when the additional evidence was intended to shut out a decision of the appeal on the merits and thus to defeat justice instead of aiding it and when its reception would have caused prejudice to the respondents which they had no time to retrieve. I do not for a moment doubt that, in appropriate cases, the court has the power to admit additional evidence or to take note of subsequent events. But that power should be very cautiously exercised and it should not be used to assist one who is grossly negligent and who invokes the power at a very late stage to the irretrievable prejudice of the other party and for defeating justice by preventing a trial on the merits. On the above view, I would have rejected the respondent's application for additional evidence in toto.

As, however, my learned brother was in favour of admitting the judgment and decree of the rent suit as additional evidence and as the admission of those two documents did not affect the ultimate conclusion, I allowed the said two documents to be admitted into evidence. It is clear, however, from the judgment in the rent suit that, although it was intended to be a final decision for that suit, it did not purport to conclude,—and cannot be held to have the effect to concluding between the parties the question of enforcibility of the disputed agreement for lease. We have not before us the written statement in the rent suit and the short judgment only indicates that the point at issue in the rent suit was the

amount of rent. It is difficult to hold merely from that judgment that it would operate as res-judicata on the question of specific performance of the agreement for lease. In this context, the rent decree also cannot be of any greater assistance to the respondent.

In holding as above, I have not overlooked the decisions, cited before us during argument. Those decisions, however, are not strictly relevant for our present purpose and do not require much discussion in this case in view of our finding on the merits on the question of res judicata. As, however, my learned brother has chosen to discuss them in his judgment, I would just record my brief comment on those cases.

The appellant relied very strongly upon the decision of the Judicial Committee in the case of *Kumar Chandra Singh Dudhoria & ors.* v. *Midnapore Zemindary Co., Ltd.,* (1) and pressed us to hold that, in the light of that decision, the rent suit judgment, and necessarily the decree also,—must be regarded not to be a final pronouncement even for purposes of the rent suit. We do not think that this extreme contention ought to succeed. The case before the judicial committee had its own special features. There two rent suits went up on appeal to the judicial committee. The dispute was as to the construction of a lease. A plea of res-judicata was raised by reason of the decision in a title suit and also of a third rent suit. The title suit was pending in appeal before the judicial committee at the time when the three rent suits were decreed and the decree in the third rent suit was expressly made subject to the final decision of the Privy Council in the title suit. In these circumstances, the judicial committee, while holding that, in view of certain facts before them, the plea of res-judicata, based on the decision in the title suit did not at all arise in the case, held further that the decision in the third rent suit also, pleaded in bar, was not a final decision so as to constitute res-judicata on the disputed question. The facts before us are entirely different. When the rent suit was decided in the present case, there was no appeal from the title suit. The learned

(1) (1941) L.R. 69 I.A. 51 at p. 58.

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Subordinate Judge also did certainly intend to decide the question of rent for the suit period between the parties, relying upon the trial court's decision in the title suit which, as already said, was not pending in appeal at the time and which he rightly took as binding between the parties so long as it stood. He did not intend to make a provisional or tentative finding which was not to be regarded as a final pronouncement for purposes of res-judicata. There was no reservation, express or implied, that the determination of rent for the period in suit and the decree, made for it, in the rent suit, was to be subject to the ultimate decision in the title suit. If, therefore, the rent suit decision had been otherwise res-judicata on the question of the specific enforceability of the present disputed agreement for lease. I would not have refused to give it that effect, upon the ground of its not being a final decision. The appellant's submission, based on *Kumar Chandra Singh's case* (1) must, therefore, fail.

I have pointed out above why the decision in the rent suit would not operate as res-judicata in the present case and would not prevent a decision of this appeal on the merits. But for that, the respondent had much to say in favour of the application here of the principle, underlying the decisions, cited by his learned Advocate namely, *Gangadhar's case* (2), *Isup Ali's case* (3), *Ganga Prasanna Mukhopadhaya's case* (4) and might have demanded at least a reference to the Full Bench in view of the contrary opinion, expressed by this court in the cases, reported in *Abdul Majid* v. *Jew Narain Mahato & Ors.* (5), *Mariamnessa Bibi* v. *Joynab Bibi* (6), *Mon Mohan Das* v. *Ship Ch. Saha & Ors.* (7), and *Bahadur Singh Singhee's case* (8). In such event, it would have been necessary also to consider the Privy Council case of *Shama Purshad Roy Chowdhury & Ors.* v. *Hurro Purshad Roy Chowdhury & Ors.* (9)

(1) (1941) L.R 69 I.A 51 at p. 58
(2) (1921) 34 C.L.J. 281.
(3) (1922) 37 C.L.J. 184.
(4) (1942) 46 C.W.N. 702.
(5) (1888) I.L.R 16 Cal. 233.
(6) (1906) I.L.R. 33 Cal. 1101.
(7) [1931] A I.R. Cal. 353
(8) (1936) 40 C.W.N. 1176.
(9) (1865) 10 M I.A. 203.

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and the Full Bench case of this Court *Jogesh Chunder Dutt* v. *Kali Churan Dutt* (1) explaining and applying that decision and the effect of the later pronouncement of the judicial committee in *Bommadevara Naganna Naidu & Ors.* v. *Ravi Venkatappayya & Ors.* (2) on the said two decisions as also the series of cases, by no means uniform, represented by *Zaharia* v. *Debi & Ors.* (3), *Ghandham Singh* v. *Bhola Singh* (4), *Panchananda Velan* v. *Vaithirath Sastrial & Ors.* (5) and *Mussamat Lachhmi* v. *Mussamat Bhulli* (6) and the like. For reasons, already given, such necessity, however, does not arise in the present case and there is no occasion for any reference to Full Bench and the appeal, so far as specific performance is concerned, falls to be decided, as already indicated by me, in favour of the appellants. I do not, therefore, propose to continue this unnecessary discussion.

In the result then, I agree that this appeal should succeed and the respondents suit for specific performance should fail. I agree also that the respondent should get instead a decree for refund of the selami money of Rs. 2,500/- as against all the defendants including those who have not appealed from the trial court's decree for specific performance. This is plainly permissible under order XLI, rule 33 of the Code and the present case is certainly a fit one for the exercise of our powers under that Rule.

The parties will bear their own costs throughout as ordered by my learned brother.

Appeal allowed.

R. N. C.

(1) (1877) I.L.R. 3 Cal. 30 F.B.
(2) (1928) L.R. 50 I.A. 301.
(3) (1910) I.L.R. 33 All 51 F.B.
(4) (1923) I.L.R. 45 All 506 F.B.
(5) (1905) I.L.R. 29 Mad. 333 F.B.
(6) (1927) I.L.R. 8 Lah 384 F.B.

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Before Mr. Justice D. N. Sinha.

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West Bengal Service Rules as supplemented by C.S. (C.C.A.) Rules, if complete—Employees in the Subordinate services, if to be governed by the Bengal Subordinate services (Discipline and Appeal) Rules.

Discharge or removal of a person on probation, if amount to dismissal or removal from service within the meaning of Article 311 of the Constitution.

Services (Training and Examination) Rules, West Bengal—Probationer not to be treated as permanent employee.

Although West Bengal Service Rules as supplemented by C.S. (C.C.A.) Rules are comprehensive, they are not complete. They do not appear to deal adequately with the subject of departmental enquiries in respect of punishment to be imposed or to be meted out to such employees. So far as the employees in the Subordinate services within the administrative Control of the State of West Bengal are concerned, it seems clear that the Bengal Subordinate services (Discipline and Appeal) Rules, 1936 apply. They were promulagated on or about the 2nd September, 1936 in exercise of the powers conferred by Rules 44 & 54 of the C.S. (C.C.A.) Rules.

The discharge or removal of a person who was on probation does not amount to either dismissal or removal from service as contemplated by Article 311 of the Constitution.

A person so discharged has no legal remedy. By law it is not necessary to hold any enquiry or any enquiry in any particular manner.

Under service (Training & Examination) Rules, West Bengal, which came into operation on the 19th March, 1953, a probationer is not to be treated as a permanent employee and is not entitled to insist on any formal departmental enquiry for his discharge during the period of probation.

Application by the discharged Officer in the West Bengal Subordinate service Under Sec. 311 of the Indian Constitution.

* Civil Revision Case No. 2024 of 1953.

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The material facts will appear from the judgment.

N. Dutt Mazumdar and *Joy Gopal Ghose* for the Petitioner.

J. Majumdar (*Additional Government Pleader*) and *Mihir Kumar Sarkar* for the Opposite Parties.

The judgment of the Court was as follows:—

D. N. Sinha, J.:—On or about the 18th August, 1944, the Government of Bengal in its Agriculture Department, Fishery Branch, sanctioned the creation of a number of posts of District Fishery Officers. On or about the 27th October, 1944, the appointment of the petitioner to the post of a District Fishery Officer was approved by Government. The approval is contained in a letter addressed by the Assistant Secretary to the Government of Bengal to the Director of Fisheries, Bengal, dated the 26th October, 1944. A copy thereof is Annexure "C" to the supplementary affidavit-in-reply affirmed by Sri Naresh Chandra Gangopadhyay on the 7th April, 1956. The relevant part thereof is as follows:—

> "The undersigned is directed to convey the approval of Government to the appointments of the marginally noted officers to the posts of District Fishery Officers sanctioned in this Department Government Order No. 3044, dated the 18th August, 1944, on probation for a period of two years.
>
> "The candidates will have to appear before the Professor of Clinical Surgery, Calcutta Medical College in regard to their physical fitness prior to their appointment on probation. There is no objection however to their joining the posts immediately. They will be confirmed in service on the satisfactory completion of the period of probation and the passing of a departmental examination, which may be prescribed during the period....."

The petitioner joined service on probation, but has never been confirmed. In May, 1951, he appeared in the prescribed

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departmental examination but failed. He has after being suspended from service, as stated hereinafter, passed in the said examination. In or about September, 1951, he was employed as District Fishery Officer at Malda. On or about the 22nd September, 1951, the Director of Fisheries, West Bengal, issued a charge sheet against the petitioner, a copy whereof is annexed to the petition and included in annexure "A" (page 19). The name, rank and grade of the officer proceeded against, as stated in the charge sheet is "Sri Naresh Chandra Gangopadhyay, District Fishery Officer on probation (Malda)." In the chargesheet five charges are mentioned the first is failure to maintain proper accounts. The second is for failure to issue receipts for months received. The third and fourth are the issuing of excessive and unauthorised loans. Tht last charge is failure to inspect tanks before advancing loans. The petitioner was directed to show cause within a fortnight from the receipt of the order why disciplinary action under Rule 7 of the Bengal Subordinate Services (Discipline and Appeal) Rules, 1936, should not be taken against him. The petitioner gave a long explanation in writing. In fact it extends over 27 closely typed pages. He nowhere took the plea that he was not an officer on probation or not governed by Rule 7 of the Bengal Subordinate Services (Descipline and Appeal) Rules, 1936. On the same day, he was placed under suspension. He was directed to proceed at once to Headquarters and to hand over charge of his office to Sri Dhirendra Nath Chakravorty, the Assistant Fishery Officer at Malda This order was obviously made under Rule 10(1) of the Bengal Subordinate Services (Discipline and Appeal) Rules 1936. The charge as framed against him related mainly to his work at Malda and in respect of which the records and documents were mostly in Malda. What the petitioner did was to apply for casual leave for five days to the Superintendent of Fisheries, Northern Circle, at Murshidabad, without mentioning the order of his suspension. He then returned to Malda and made entries in the Stock Register and, *inter alia*, recorded a note in the same as follows: "Stock varified on 29-9-51." It is not denied that such entries were made. The explanation is that they were made in the usual course.

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On or about the 7th December, 1951, the petitioner was called upon to see the Director of Fisheries in connection with the departmental enquiry. He accordingly saw the said officer on the 10th December, 1951. What happened at the enquiry is a matter of dispute. According to the petitioner, he was faced with new charges and asked to make statements with regard to them which he refused to make unless and until the charges were reduced into writing. According to the respondents, all that happened was that the Director tried his best to make the petitioner answer only relevant questions in elucidation of his explanation in his written statement, but the petitioner refused categorically to answer such questions until they were given to him in writing before he would reply to the same. It is stated and not unreasonably that this would have meant giving him one set of questions one day and then on receipt of his reply giving him a supplementary set of questions in writing for his reply and so on, and that this was an unheard of and impracticable procedure in departmental proceedings. The petitioner further took up an attitude which is described as insolent, and the Director gave him further time to reconsider his position and to come up again on the 30th December, 1951. On the 11th December, 1951 however he sent in a letter virtually refusing to comply with the requisitions of the Director, and it appears that on the 11th December, 1951, the Director declared that under the circumstanres the enquiry may be considered as closed. It is stated by the respondents that the matter was really decided on documentary evidence and at no time the petitioner ever expressed his desire to examine any witness. There is of course no question of cross-examining witnesses because the respondents never called any witness in support of the charges. Although in his affidavit-in-reply, paragraph 18, the petitioner has denied that he did not ask for any such opportunity, nothing has been placed before me to show that he did. The Director of Fisheries thereupon proceeded to consider the case and made a report to Government, wherein he found the petitioner guilty of all the charges and made a recommendation that his services be terminated. On the 14th May, 1952 a show cause notice was issued upon the petitioner addressed by the Assistant Secretary to the Government of West Bengal Forest

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and Fisheries (Fish) Department. The petitioner was described as "Sri Naresh Chandra Gangopadhyay, District Fishery Officer (on probation) Malda, now under suspension." It is stated in the said notice that Government had carefully considered the report of the Director and other relevant papers and agreed with the findings recorded therein and had come to the conclusion provisionally that the petitioner should be punished with discharge from Government service under Rule 49(VI) of the C.S.(C.C.A.) Rules. The petitioner was therefore called upon to submit within 15 days from the date of the receipt of the order any representation that he might desire to be considered as to why he should not be punished in the manner stated in the grounds referred to. The petitioner thereupon showed cause and his second representation contained 65 closely typed pages. The Government thereupon forwarded the records and its own findings to the Public Service Commission for its recommendation. The Commission carefully went into the matter and expressed the opinion that the petitioner should be discharged from service. A copy of this recommendation was produced at the hearing and I direct that it be kept in the record. The commission pointed out that the petitioner, even after 7 years of probation, displayed incompatible temperament apart from other ommission and commissions, and that he was unsuitable for retention in service. It pointed out that the representation made by the petitioner consisted of long dissertations on the interpretation of the Rules and Orders, which were not only incorrect and inacceptable, but that the petitioner was adamant to maintain his own view and was certainly not likely to observe discipline in public service and was therefore not suitable to be retained therein. Finally it pointed out that the petitioner had degrees in Pshychology and Anthropology and his services might be utilised in departments where such qualifications were useful, but not in the department of fisheries. On the 28th March, 1953, an order was issued by the Government of West Bengal, the relevant part of which is as follows:

> "With reference to this Department Memo. No. 3857 dated 14-5-52, drawing up proceedings against Sri N. C. Gangopadhyay, District Fishery Officer of Subordi-

nate Fishery service Class, I, by the Director of Fisheries under Rule 7 of Bengal Subordinate Services (Discipline and Appeal) Rules 1936, Government have now carefully considered the charges and the explanations offered by him in consultation with the Public Service Commission, West Bengal and have come to the finding that Sri N. C. Gangopadhyaya is guilty in respect of all the five charges framed against him by the Director of Fisheries. On the recommendations of the Public Service Commission, it has accordingly been decided that he should be discharged from Government service.

The Government are accordingly pleased to order that Sri N. C. Gangopadhyaya be and is hereby discharged from service with effect from the date of issue of this order."

On the 6th July, 1953, this Rule was issued upon the respondents to show cause why a writ in the nature of mandamus should not issue directing them to forbear from giving effect to the orders dated 22-9-51 and 31-3-53 complained of in the petition. The order dated the 28th March, 1953 was forwarded to the petitioner on the 31st March, 1953. The petitioner also prays for issue of writs in the nature of certiorari and prohibition and also for such further or other orders as to this Court may seem fit and proper.

Mr. Dutt Majumdar appearing on behalf of the petitioner has framed his case thus. Firstly he says that his client is not employed on probation. He says that the original appointment was on probation for a period of two years. The two years period having passed, the petitioner must be deemed to have been confirmed. So far as the departmental examination is concerned it is true that he had once failed in it, but he has now passed. Next he says that his client is not governed by the Bengal Subordinate Services (Discipline and Appeal) Rules, 1936, but so far as the enquiry and discharge are concerned, he is governed by Rules 55 and 56 read with Rule 49 of the C.S. (C.C.A.) Rules. He followed this up by saying if these Rules applied there has been a clear violation of such

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Rules and also Article 311 of the Constitution, inasmuch as the petitioner was not given a reasonable opportunity of establishing his defence. He was not allowed to call witnesses or to examine or cross-examine witnesses to establish his defence. He has therefore argued that the order of discharge really amounted to an order of dismissal in contravention of the law and should be set aside.

Coming to the first point raised by learned Counsel, I do not agree that the petitioner at the relevant time was not employed as an officer working on probation. The original order has been set out above. It appoints officers on probation for a period of two years, and also says how they will be confirmed. Two conditions are imposed for such confirmation. Firstly, the officer will have to satisfactorily complete the period of probation and secondly he must pass the departmental examination during that period. There is no evidence to show that the petitioner did either. So far as the departmental examination is concerned, it is admitted that he did not pass it within two years. In fact he never passed it before his order of suspension. The petitioner therefore cannot have it both ways. On the one hand he urges that his passing the departmental examination was within time, and yet he says that upon the expiry of the two years he automatically stood confirmed. This is wholly inconsistent. Secondly, there is nothing to show that his service was considered satisfactory at any time. In fact, it is stated in the affidavit-in-opposition that there were continuous complaints against the petitioner which had to end in a departmental enquiry. I have also set out above, various notices and orders which clearly described the petitioner as being on probation. Although he made long representations, he has nowhere taken up the position that he was no longer on probation and could not be addressed as such. It is plain therefore that the petitioner at the relevant time was an officer on probation. That being so, the next question is as to what Rules apply to the petitioner. Mr. Dutt Majumdar has drawn my attention to my own decision *Hirendra Nath Roy* v. *State of West Bengal* (1). The learned Counsel argues that his client is governed by the Bengal

(1) [1955] 59 C.W.N. 450.

Service Rules as supplemented by the C.S. (C.C.A.) Rules. According to him the Bengal Subordinate Services (Descipline and Appeal) Rules, 1936 no longer exist. In any event, his client is not governed by it. In the decision mentioned above, to which reference has been made by both parties, I have set out the history of the service rules applicable to employees in West Benial. I have traced the origin of the West Bengal Service Rules and pointed out that these rules were comprehensive and self contained and apply to all Government servants within the administrative control of the State of West Bengal. Although I have said that these Rules were comprehensive and self-contained, it is not to be taken that they deal with the entire ambit of Rules applicable to Government servants within the administrative control of the State of West Bengal. Although they are comprehensive, they are not complete. Thus they do not appear to deal adequately with the subject of departmental enquiries in respect of punishments to be imposed or to be meted out to such employees. For this, we have to go elsewhere. So far as the employees in the subordinate services within the administrative control of the State of West Bengal are concerned, it seems clear to me that the Bengal Subordinate Services (Discipline and Appeal) Rules 1936, apply. These Rules were promulgated on or about the 2nd September, 1936, in exercise of the powers conferred by Rules 44 and 54 of the C.S. (C.C.A.) Rules. This is because the Government of India Act, 1935, came into operation some time in 1937. Section 241 of the Government of India Act, 1935, for the first time introduced a provision for the appointment and control of provincial services by the Provinces. Hitherto, there was an unitary form of Government in India and everything was being controlled by the Secretary of State. The relevant part of Section 241 is as follows:—

"241 (1):—Except as expressly provided by this Act, appointments to the Civil Services of, and civil posts under, the Crown in India, shall, after the commencement of Part III of this Act, be made—

(a).....

(b) in the case of services of a Province and posts in

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connection with the affairs of a Province by the Governor or such person as he may direct,

(2) Except as expressly provided by this Act, the conditions of service of persons serving His Majesty in a Civil capacity in India shall, subject to the provisions of this section, be such as may be prescribed—

(a) ....

(b) in the case of persons serving in connection with the affairs of a Province, by Rules made by the Governor of the Province or by some person or persons authorised by the Governor to make rules for the purpose."

The most important section however for our purpose is section 276 which runs as follows:

"Until other provision is made under the appropriate provisions of this Part of this Act, any rules made under the Government of India Act relating to the civil services of or civil posts under the Crown in India which were in force immediately before the commencement of Part III of this Act, shall, notwithstanding the repeal of that Act, continue in force so far as consistent with this Act, and shall be deemed to be rules made under the appropriate provisions of this Act."

In my decision quoted above, I have pointed out the genesis of the C.S. (C.C.A.) Rules, which were made under section 96B of the Government of India Act, 1919. The result was that rules made under the C S. (C.C A.) Rules would be valid rules, as provided by Section 276 of the Government of India Act, 1935, and would in fact be deemed to be made under that Act. Therefore rules which were made for the purpose of controlling the provincial services would be valid rules and must be deemed to be rules made under Section 241 of the Government of India Act, 1935. These Rules, namely the Bengal Subordinate Services (Discipline and Appeal) Rules, 1936, are quite short and deal with only discipline and appeals. The rules really comprise mostly of a voluminous schedule

setting out the titles of services, the authorities empowered to appoint, the authorities empowered to impose penalties and the appellate authorities. The schedule however is not complete. I have already pointed out that these subjects are not adequately dealt with in the West Bengal Service Rules and therefore serve as a supplement to the West Bengal Service Rules, so far as the subordinate services are concerned. That the petitioner is in a subordinate service is not denied. Therefore there does not seem to be any reason why these Rules are not applicable. Mr. Dutt Majumdar's effort in this behalf to exclude the operation of these Rules is quite understandable, and the reason is as follows. According to Rule 7, several penalties are mentioned, the last two being removal and dismissal. Then there is an explanation to Rule 7. Explanation (a) says that the discharge of persons appointed on probation during the period of probation does not amount to removal or dismissial within the meaning of these Rules. The position therefore is as follows: The petitioner being a civil servant under the Government, Article 311 would *prima facie* apply to him, if it was a case of dismissal or removal. The present case would be certainly a case of dismissal or removal, had it not been in respect of an officer employed on probation. It is however one of the conditions of service that if he is discharged during the period of probation, then it will not amount to dismissal or removal. In other words, the appointment is on 'probation' that is to say, on the condition that the petitioner should conduct himself satisfactorily to the employer. If he does not do so, then during the period of probation, the Government could terminate his service. Such termination is not removal or dismissal, because it is in accordance with the terms of service and not by way of punishment. It has now been authoritatively held that the termination of service of an employee in Government service which is in accordance with his contract and or conditions of service is not dismissal or removal. *Satis Chandra Anand* v. *Union of India* (1) and *Shyamlal* v. *State of Uttar Pradesh* (2).

On the other hand, if the C.S. (C.C.A.) Rules apply, then the petitioner would be in a different position. The C.S.

(1) [1953] S.C.A. 293 ; [1953] A.I.R. (S.C.) 250.
(2) [1954] S.C.A. 476 ; [1954] A.I.R. (S.C.) 250.

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(C.C.A.) Rules have been considerably modified by amendments from time to time. Mr. Dutt Majumdar has drawn my attention to the tenth list of correction published by Government as amended by correction slip No. 52, dated the 28th March, 1948. Rule 49 has been amended and it has been provided that the termination of employment of a person appointed on probation during or at the end of the period of probation in accordance with the terms of appointment and the rules governing the probationary service, does not amount to removal or dismissal within the meaning of this Rule or of Rule 55. By correction slip No. 114, dated the 28th January, 1949, a new Rule, namely, Rule 55(B) has been introduced which is as follows:

> "55B. Where it is proposed to terminate the employment of a probationer whether during or at the end of the period of probation, for any specific fault or on account of his unsuitability for the service, the probationer shall be apprised of the grounds of such proposal and given an opportunity to show cause against it, before orders are passed by the authority competent to terminate the employment".

It will thus appear that if the petitioner is governed by the C.S. (C.C.A.) Rules, he should have had an opportunity to show cause against an order terminating his employment. It is clear that his employment is being terminated for a specific fault as also for his unsuitability for the service. Mr. Dutta Majumdar has also referred me to an amendment in the C.S. (C.C.A) Rules of Rule 55 made by the Government of West Bengal, by notification, dated the 27th July, 1949, published in the 'Calcutta Gazette' of 1949, Part I, page 1341. From this he appears to argue that Rule 55 applies to all Government servants. Obviously it does not. The C.S. (C.C.A.) Rules have not been abrogated wholly so far as services in the State is concerned, but are referred to in the West Bengal Service Rules. Thus persons who are not in the subordinate services would be governed by those rules. I find however no reason why the Subordinate Services (Discipline and Appeal) Rules, 1936 are not in force and why does not

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moval from service as contemplated by Article 311 of the Constitution. Therefore even assuming that the departmental enquiry was not made properly, the petitioner has no legal remedy because by law it is not necessary to hold any enquiry or any enquiry in any particular manner. Mr. Dutt Majumdar has drawn my attention to the fact that in the notice, dated 14th May, 1952, the petitioner was asked to show cause why he should not be punshed and discharged from service under Rule 49(VI) of the C.S. (C.C.A.) Rules. This is obviously a blunder on the part of the officials concerned. The original charge-sheet clearly mentions that the proceedings had been initiated under rule 7 of the Bengal Subordinate Services (Discipline and Appeal) Rules 1936. The order of discharge, dated 28th March, 1953, also shows that the discharge was under rule 7 of the said rules. A mistake somehow crept in to the second show-cause notice. I do not think that this has made the order of discharge illegal. I might also mention that the rules aplicable to probationers have been placed on a clear footing now by the 'Services (Training and Examination) Rules, West Bengal' which came into operation on the 19th March, 1953. Under these rules, a probationer is not to be treated as a permanent employee and is not entitled to insist on any formal departmental enquiry for his discharge during the period of probation. If these rules apply, then also the petitioner is not entitled to any relief.

Mr. Majumdar has also drawn my attention to the fact that even if Rule 55B applies, there is a significant difference in its wordings to Article 311 of the Constitution. In the constitution the words "reasonable opportunity" appear. In other Rules the words "adequate opportunity" have been used. All that Rule 55B, says is that the delinquent should be given "an opportunity" to show cause. He argues that in this case "an opportunity" has been given. I think that this is an arguable proposition. The petitioner was served with show-cause notices. He filed long representations dealing with every aspect of the case. He never asked for an opportunity for calling evidence. Under the circumstances, I do not see why, even if Rule 55B, applies, can it be said that the petitioner was wholly deprived of an opportunity to show cause.

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The authorities proceeded on the documents which were fully dealt with by the petitioner in his representations. Taking the case as a whole, I am by no means convinced that the petitioner has no opportunity to establish his innocence. In any event, as I have shown above, there has been no violation of any of his legal rights.

this application must be dismissed. The Rule will stand dis- this application must be dismissed The Rule will stand dis- charged. Interim order, if any, is vacated. There will however be no order for costs.

Rule discharged.
No order as to costs.

R. M.

APPELLATE CIVIL.

Before Mr. Justice B. K. Guha and

Mr. Justice P. N. Mookerjee.

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v.

MEWAJAN BIBI & ORS.*

Bengal Tenancy Act (Ben. Act VIII of 1885)—Section 12—Sale of a permanent tenure by unregistered deed—Effect under Section 53A of the Transfer of Property Amendment Act (XX of 1929) Admissibility of the Sale deed—Nature of possession requisite under Section 53A—Scope of Section 53A.

Under Section 53A of the Transfer of Property Act, the requisite contract in writing can be proved by an unregistered deed of sale. Paragraph 4 of the Section clearly shows that the "contract of transfer" referred to in Paragraph 1 thereof may be found from the defective "instrument of transfer" and for purposes of the Section no distinction is to be made between "contract of transfer" and "contract for transfer."

Birendra Kishore Roy v *Haruzzaman Peada & ors.*(1) dissented from.

When a contract of sale (as in this case) is compulsorily registrable under Section 12 of the Bengal Tenancy Act, it would not come within Section 49 of the Indian Registration Act and would not become admissible in evidence under the proviso to that Section; at the same time it would not be hit by that Section.

Under Section 12 of the Bengal Tenancy Act, a sale of a permanent tenure (irrespective of value) can be made only by a registered instrument. An unregistered deed, therefore, cannot pass title or be regarded as a valid deed of transfer; but for purposes of Section 53A of the Transfer of Property Act, mere non-registration would not affect the admissibility of the sale deed to prove the requisite "contract to transfer" or the terms thereof.

* Appeal from Appellate Decree No. 334 of 1949 against the decree of Sri N. Chaudhuri, Sub-Judge, Suri, Dist: Birbhum, dated 28th day of Feb., 49 in T.A. No. 151 of 1947, reversing the decree of the Additional Munsif, Rampurhat, dated 20th day of Sept., 1947.

For purposes of Section 53A of the Transfer of Property Act, however, the possession of the suit lands must be referable to the relevant contract of transfer. There must also be at the date of the suit a lawful continu- contractual possession.
contractual possession.

(1) (1949) 49 C.W.N. 649.

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Where, as in this case, the Plaintiffs being purchasers of a permanent tenure under an unregistered deed of sale, brought a suit for permanent injunction restraining the Defendants, who were subsequent purchasers of the same property under registered deeds of sale, from interfering with their possession:

Held that the deed of the Plaintiffs, although unregistered, was admissible in evidence under Section 53A of the Transfer of Property Act to prove the contract of sale, but the possession of the Plaintiffs not being a lawful continuance of the contractual possession, but having turned out to be unauthorised or wrongful possession, Section 53A would be of no assistance to them, and their suit must fail.

Held, tentatively: A dispossessed transferee is not competent to bring a direct suit for recovery of possession under Section 53A of the Transfer of Property Act.

Probodh Kumar Das & ors. v. *Dantmara Tea Co. Ld.*(1)
S. N. Banerjee & anr. v. *The Kuchwar Lime & Stone Co. Ld.*(2) referred to.

Suit for Permanent Injunction restraining the Defendants from interfering with the Plaintiff's possession.

The material facts will appear from the judgment.
Lala Hemanta Kumar for the Appellant.
Bon Behari Mukherjee for the Respondents.
The judgment of the court was as follows:—

P. N. Mookerjee, J. :—This second appeal arises out of a suit for specific performance, or, in the alternative, for what, in substance, appears to be permanent injunction, restraining the defendants from interfering with the plaintiffs possession. The claim for specific performance was clearly barred by limitation and it was not pressed by the plaintiffs after its dismissal by the trial court on that ground. The plaintiffs alternative claim, however, was decreed by the learned Munsif under Section 53A of the Transfer of Property Act and the defendants were held debarred and they were actually restrained from interfering with the plaintiffs possession of the suit properties and/or from exercising any rights in respect thereof which might affect such possession. That decision, however, was eventually set aside by the lower appellate court which refused to apply Section 53A to the facts

(1) [1930] L.R. 66 I A. 298
(2) [1941] 46 C.W.N. 374 (P.C.).

of this case and, the plaintiff's suit having been dismissed, they have now come up to this court in Second Appeal.

The learned Munsif described the suit as rather of an unusual type. It followed as a sequel to another suit and, indeed, the litigation between the parties started sometime in 1938 and had a long and chequered career having once come up to this court in previous second appeal (S.A. 1311 of 1939). The present point of dispute was eventually left open by this court on that previous occasion and the present plaintiffs who also filled the same capacity in the earlier suit (T.S. 38 of 1938) are now seeking a final decision on that point in their favour. The plaintiffs claim is being restricted by the defendants-respondents.

From the admitted owners of the disputed properties, the plaintiffs purchased the same on 14th Magh 1341 B.S. That purchase was made by an unregistered Kabala (Ex. 1) for a sum of Rs. 49/-. This valuation, however, though less than the minimum of Rs. 100/- for compulsory registration of sale deeds under Section 17(1) of the Indian Registration Act, could not cure the defect of non-registration and confer validity on the unregistered Kobala as the properties in question were permanent tenures under the Bengal Tenancy Act which could be transferred only by registered documents, irrespective of valuation, under Section 12 of the Bengal Tenancy Act. This has been expressly held to be so in the previous Second Appeal (S.A. 1311 of 1939) and the parties are bound by that decision. The plaintiffs, therefore, cannot claim title to the suit properties on the strength of their unregistered Kobala (Ex 1), referred to above.

The defendants are subsequent purchasers of the suit properties from the same admitted owners but by three registered Kobalas which are dated 14th Chaitra, 1342 B.S., 6th Bhadra, 1343 B.S., and 20th Chaitra, 1343 B.S. On the strength of these purchases they (the defendants) dispossessed the plaintiffs in or about Baisakh 1344 B.S. whereupon the plaintiffs filed the earlier suit, T.S. No. 38 of 1938. In that suit, which succeeded in the two courts below, the plaintiffs

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claim of title was eventually negatived by this court which found title in the defendant's favour subject to the plaintiff's rights, if any, available to them in law (including Section 53A of the Transfer of Property Act) under the contract contained in their unregistered Kobala (Ex. 1). Such rights, if any, were left open for consideration in future proceedings between the parties and, for that consideration, this instant suit was brought by the plaintiffs in 1949.

For appraisement of the true legal position some other facts are necessary. There is no dispute that, on the strength of their Kobala (Ex. 1) of 1341 B.S. the plaintiffs obtained possession of the suit properties on or about 14th Magh, 1341 B.S. There is also no dispute now that they were dispossessed from the said properties in or about Baisakh 1344 B.S. and that the plaintiffs recovered possession from the defendants on 21.8.38 in execution of the decree made in their favour by the trial court in the earlier suit (T.S. 38/38), which was eventually set aside or reversed by this court in Second Appeal, and that they have managed to continue in possession in spite of such reversal by filing the present suit immediately after this court's decision in the previous second appeal and by obtaining therein an appropriate temporary injunction which has virtually remained inforce at all material times up till this date.

Before coming to the major issue between the parties, arising under Section 53A of the Transfer of Property Act, we shall dispose of two minor points which were found against the plaintiffs by the learned Munsif and were not repeated before the lower Appellate Court. The first relates to the plaintiff's claim of specific performance the other to their claim of title by adverse possession.

As to specific performance, the plaintiffs claim is clearly barred by limitation. They had ample knowledge and notice of the defendants Kobalas at or about the time of their dispossession in Baisakh, 1344 B S. and, accordingly, the relevant refusal of their Vendors, the admitted original owners of the disputed properties, to perform the contract, contained in the

plaintiff's Kobala (Ex. 1) of 1341 B.S., which is the only contract on which they can rely, must be deemed to have taken place before Jaistha 1344 B.S. corresponding to about the middle May 1937. The present suit was filed on 12th September, 1945, that is, long beyond three years from the above date of refusal. The plaintiff's claim for specific performance was, therefore, clearly time-barred and it has been rightly disallowed. We need only add that nothing to the contrary was argued or placed before us to justify a different conclusion.

Clearly, also, the plaintiff's cannot claim acquisition of title by adverse possession. Their possession was admittedly disturbed in Baisakh 1344 B.S. and they have succeeded in maintaining their possession practically since the institution of this suit by temporary injunction. In view of Section 15(1) of the Indian Limitation Act, and on the principle, underlying the same, this effective injunction period cannot certainly be taken into account in calculating the period of adverse possession and, if that is left out, the plaintiffs possession would be for very much less than twelve years. No question of acquisition of title by adverse possession can, therefore, arise in the present case.

We come now to the crucial point in the case, namely, the question under Section 53A of the Transfer of Property Act. We are inclined to hold, notwithstanding some observations to the contrary. *Birendra Kishore Roy* -vs- *Haruzzaman Peada & ors* .(1) that the requisite contract in writing can be proved by the unregistered Kobala ordered of sale (Ex.1) obtained by the plaintiffs on 14th Magh 1341 B.S. Paragraph 4 of the section (Section 53A) clearly shows that the "contract to transfer", referred to in paragraph 1, thereof, may be found from the defective "instrument of transfer" and, for purposes of this section, no distinction is to be made between "contract of transfer" and "contract for transfer", as was done in the case cited. Nor do we think that the unregistered Kabala (Ex. 1) would be inadmissible in evidence to prove this or the requisite contract. It is true that the Kobala (Ex. 1), in order to be a valid document of transfer, should have been

(1) (1945) 49 C.W.N. 649.

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registered under Section 18 of the Bengal Tenancy Act. It is true, also, that the said document being compulsorily registrable, not under the Indian Registration Act or the Transfer of Property Act but under another enactment, namely, the Bengal Tenancy Act, would not come within Section 49 of the Registration Act and would not thus become admissible in evidence under the proviso to that section. But at the same time, it is clear also that, the said document not being within the terms of the said section (Section 49 of the Registration Act), it would not be hit either by that section. Its admissibility or otherwise would, therefore depend upon other provisions of law. In this connection, reference may be made to *Sohan Lal and others* -vs- *Mohan Lal and ors* (1), *Dewal Pisan Shah and ors.* -vs- *Dharma Rajaram Manggaruddi and another* (2), *Rama Sahu* -vs- *Gowro Ratho* (3) and *Abdul Alim* -vs- *Abdul Sattar* (4).

There can be no doubt that the Kobala (Ex. 1) is invalid as a document of title. Being unregistered, it cannot pass title or be regarded as a valid deed of transfer in view of Section 18 of the Bengal Tenancy Act and, to the extent that it purports to effect transfer and confer title, it must be held to be invalid and of no effect whatsoever. For purposes of proving, however, the requisite contract in writing under Section 53A of the Transfer of Property Act or the terms thereof these appears to be no valid objection in law to its reception in evidence. The section (Section 53A itself clearly contemplates proof of these matters by the defective "instrument of transfer" and we find nothing in Section 91 of the Indian Evidence Act which would exclude such proof. A "contract to transfer" is not *per se* registerable under the law and, accordingly, mere non-registration would not affect the admissibility of the Kobala (Ex. 1) to prove the requisite "contract to transfer" or the terms thereof for purposes of Section 53A of the Transfer of Property Act. *Skinner's Case* (5) which was decided on the terms of old Section 49 of the Indian Registration Act does not apply as the Kobala (Ex 1) does not, admittedly, come under that section and, even apart from the special

(1) (1928) I L R. 50 All. 986 F.B.
(2) (1917) I.L.R. 41 Bom. 550.
(3) (1920) I L R. 44 Mad. 55 F.B.
(4) [1936] A.I.R. Cal. 130.
(5) (1929) L.R 56 I A 363 (S.C.); 33 C W N 1150 P C.

proviso which was engrafted to the said Section 49 by the Amending Act 21 of 1929 to supersede *inter alia* the said decision, upon the enactment of Section 53A of the Transfer of Property Act and which is not relevant—and, indeed, no resort to it is necessary for our present purpose, the Kobala (Ex. 1) would be admissible to the above limited extent. We would therefore, hold that there was, in the present case, the requisite contract in writing as required by Section 53A of the Transfer of Property Act.

There is also no dispute that the plaintiffs obtained possession of the disputed properties in pursuance of the Kobala (Ex. 1) of 1341 B.S. and their initial possession was certainly referable to that purported transfer or the contract, underlying the same and deducible from it. Even then, however, the plaintiffs cannot succeed in the present suit. Their possession was admittedly disturbed in 1344 B.S. when they were dispossessed by the defendants from the present suit properties. they succeeded, no doubt, in regaining possession in execution of the decree of the trial-court, passed in the earlier Title Suit No. 38 of 1938, but, that decree having been set aside in second appeal by this Court, they have been maintaining their possession on the strength of restraint orders, obtained from the court, whereby they have successfully prevented the defendants-respondents from getting restitution in terms and on the basis of this court's decision on the earlier occasion. In these circumstances, we are unable to treat the plaintiff's present possession as strictly legal or at all relevant or sufficient for purposes of Sec. 53A of the Transfer of Property Act. That possession is plainly that of trespassers as it is truly referable only to the previous decree of the trial court in the earlier Title Suit No. 38 of 1938, since set aside or snperseded, and it would not be quite proper to refer it back—and, indeed, it would be a violent inference to treat it as referable,—to the contract in the Kobala (Ext. 1) so as to suffice for purposes of Section 53A. The position would have been quite different if the plaintiff had succeeded in regaining possession under any valid order or decree of court, restoring their original possession, say, for example, under Section 9 of the Specific Relief Act. In such event, the plaintiff's

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possession would have been legitimately referable to the contract, evidenced by the Kobala (Ex. 1), and the present suit would then have been quite legitimately a suit for protecting possession under Section 53A of the Transfer of Property Act in the light of the decisions, reported in *Pandit Ram Chander* v. *Pandit Maharaj Kunwar & ors.* (1) *Mastram* v. *Maung and ors* (2), *Mt. Firdous Jahan* v. *Dr. Md. Yunus and ors.* (3), *Ewaz Ali* v. *Mt. Firdous Jahan & ors.* (4), *Kauia Ram & ors.* v. *Chaman Lal & ors.* (5), *Mt. Shankari & ors.* v. *Milkha Singh and ors.* (6). In the one case the plaintiffs possession would have been *order* a lawful restoration of the initial or original contractual possession and thus in law a lawful continuance of that rightful possession; in the other, it would be maintenance or retention of present unauthorised possession under a superseded decree and thus wrongful continuance of possession which law would not,—at any rate, should not, ordinarily permit to be tacked on to the rightful initial possession so as to form one complete whole for the purpose of supporting or sustaining a claim of right, be it passive or active, under a limited statutory equity, like the one, reocgnised and embodied in Section 53A, of the Transfer of Property Act.

In the events, however, which have happened in the present case, none of the above decisions can assist the plaintiffs. In the Allahabad *Pandit Ram Chander* v. *Pandit Maharaj Kanwar & ors.* (1), the transferee was clearly in possession at the date of the suit under and in pursuance of the relevant contract of transfer, and similar appears to have been the position in the Rangoon case *Mastram* v. *Ma Ohn & ors.* (2) as conceived by the learned Judge who decided the same, the mortgagor's possession being in law the possession of the mortgagee The Oudh Case *Mt. Firdos Jahan* v *Dr. M. L. Yunus and ors.* (3), on appeal *Ewaz Ali* v. *Mt. Firdous Jahan & ors.* (4) does not lay down any contrary principle as the suit there (which was intituted under order 21, rule 103 C.P.C.) was rightly treated as a continuation of the order 21, rule 100 C.P.C. Proceedings, thus relating back to the date of institu-

(1) [1939] A.I.R. All. 611
(2) [1934] A.I.R. Rang. 284.
(3) [1940] A.I.R. Oudh. 1.
(4) [1944] A.I.R. Oudh. 212.
(5) [1934] A.I.R. Lah. 751.
(6) [1941] A.I.R. Lah. 407 F.B.

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tion of the said proceedings, on which date admittedly the plaintiff was clearly in possession on the strength of the relevant contract under Section 53A of the Transfer of Property Act. In the Lahore cases *Kaura Ram & ors.* v. *Chaman Lal and anr.* (1) and *Mt. Shankri & ors.* v. *Milkha Singh* (2) also, the transferees were in possession under the respective invalid deeds of transfer at the dates of the respective suits.

It is thus clear that all these decisions clearly recognised that, for the trasferee to succeed under Section 53A of the Transfer of Property Act, possession on his part, referable to the relevant contract of transfer, was necessary at the date of the relevant suit or proceeding. This is wanting in the present case, as found above by us, and, accordingly, the plaintiffs' present suit cannot succeed. Even if this suit be taken as a continuation of the previous suit (T.S. No. 38 of 1938) the same defect would remain—it would even be more pronounced —as the plaintiffs were, admittedly, not in possession at all on that date.

It is only necessary to add one word of caution with regard to the observations of *Allsep J. In Municipal Board, Etah* v. *L. Mordhing* (3). Those observations were clearly obiter, as there the learned judge was merely concerned and actually dealing with a transferor's claim to assert active rights under Section 53A, and, wide though they are, the said observations should not be read as permitting a direct suit for recovery of possession by the transferee under Section 53A of the Transfer of Property Act. Otherwise, the learned Judge's observations would clearly conflict with the interpretation, put upon the section (Sec. 53A), and the limited scope, assigned to it, by the several Privy Council decisions, reported *inter alia* in *Probodh Kumar Das & ors.* vs. *Dantmara Tea Co. Ltd.* (4) (4) and *S. N. Banerjee and another* —vs.— *The Kuchwar Lime and Stone Co. Ltd.* (5) and they would practically mean conversion of the "passive equity" [vide *Probodh Kumar Das* v. *Dantmara Tea Co. Ltd.* (6)] stressed by the Privy Council, into an "active equity" and it would indeed, be difficult to reconcile

(1) [1934] A.I.R. Lah. 751.
(2) [1941] A.I.R.Lah. 407. F.B.
(3) [1940] A.I.R. All. 340.
(4) [1939] L.R. 66I.A. 293.
(5) [1941] 46 C.W.N. 374 P.C.
(6) [1940] 45 C.W.N. 132.

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them with the Judicial Committee's aft-quoted expression of opinion that the section (Sec. 53A) is a "partial importation into India of the English equitable doctrine of part performance *see Pir Bakhsh* —vs.— *Mahomed Tahar* (1). As at present, advised, we are not prepared to take the extreme view of the section, which may be founded on *Allsop—J's obiter dictum*, particularly when it does not seem necessary to do so to effectuate the purpose of the section in the light of the above Privy Council decisions. The dispossessed transferee is certainly entitled to recover possession under Section 9 of the Specific Relief Act provided the acts with vigilance and due diligence and we do not find any sufficient reason or justification for extending the scope of the section by unduly stretching the language of their Lordships of the Privy Council, and even an equitable construction, having that effect, would not be justified in view of what we have said above, as equity aids the vigilant.

Lastly, we have to refer to the decision of this court, reported in *Ram Pratap Kayan* v. *The National Petroleum Co. Ltd.* (2) which was cited on behalf of the appellants as an instance of "active equity" under Section 53A of the Transfer of Property Act, assisting a plaintiff in a suit for ejectment. We do not, however, deem it necessary to examine the full implications of the said decision on the present occasion, as it was not the case of a transferee, suing as plaintiff, but was the case of a transferor plaintiff, where different considerations may well arise under Section 53A. We would, therefore, for the present, leave aside the said decision and reserve it for fuller consideration on an appropriate future occasion.

As a result of our foregoing discussion we are bound to hold that the appellant's suit was rightly dismissed by the lower appellate court. We, accordingly, affirm its decision and dismiss this appeal. We would, however, direct the parties to bear their own costs thorughout.

B. K. Guha, J. :—

I agree.

Appeal dismissed.

R.N.C.

(1) [1934] L.R. 61 I.A. 388 ; A.I.R. P.C. 235.
(2) [1949] 54 C.W.N. 58.

ORIGINAL CIVIL.

Before Mr. Justice P. B. Mukharji.

UNITED PRINTING & BINDING WORKS LTD.

V.

KISHORI LAL SARAOGI.*

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The Arbitration Act (X of 1940)—First Schedule, Clause 2—Appointment of umpire by arbitrators—Provisions, whether directory or mandatory—Sections 8(1)(C) and 8(2)—Waiver.

Clause 2 of the First Schedule of the Arbitration Act provides for the appointment of an umpire by an even number of arbitrators. Failure to appoint an umpire under the said clause does not render invalid either the arbitration or the award. It is at best a breach of a regulatory provision. The word 'shall' as used in the said clause is directory and not mandatory. Breach of the condition can be waived by conduct of the parties.

Jawala Prasad v. *Amar Nath* (1) dissented from.
Tikaram Khupchand v *Hansraj Hazarimal & anr.*(2) relied on.

Section 8(1)(C) of the Act expressly provides for the case where the parties are required to appoint an arbitrator and do not appoint him. Such a provision in the Act would have been unnecessary if the provisions contained in clause 2 of the First Schedule were intended to be mandatory.

Where (as in this case) the arbitrators have agreed and there was no occasion for an umpire to be appointed, it would be too technical to set aside the award on the ground that no umpire was appointed

The Bombay Company Ltd. v. *The National Jute Mills Co.*(3) referred to.

Clause (2) of the First Schedule enjoins the arbitrators to appoint an umpire not later than one month from the latest date of their respective appointments. Where (as in this case) on the expiry of the period so prescribed, the parties appear at different sittings before the arbitrators without any protest, their conduct waives the defect of non-appointment of an umpire.

Section 8(1)(C) read with Section 8(2) lay down the procedure to be followed by the parties where no umpire is appointed by the arbitrators. If a party (like the applicant in the present case) fails to follow the said procedure and quietly appears before the arbitrators, he is estopped by his conduct from challenging the award afterwards on the ground that no umpire had been appointed.

* Re: Award Case No. 67 of 1956.

(1) [1951] A.I.R. All., 474.
(2) [1954] A.I.R. Nag., 241.
(3) (1912) I.L.R. 39 Cal. 669.

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Sambhu Nath v. *Hari Shankar Lal* (1) relied on.

Application to set aside an award.

The material facts will appear from the judgment.

D. C. Sethia and *A. K. Basu* for the Applicant.

S. Tibriwalla for the Respondent.

The judgment of the Court was as follows.

June, 5

P. B. Mukharji, J. : This is an application by United Printing & Binding Works Ltd., a private limited company, to set aside an Award made by two Arbitrators Bimal Chatterjee and Kishanlal Mohta being respectively the nominees of the petitioner and the respondent Kishori Lal Saraogi. By Clause 15 of an Agreement dated the 30th March, 1954 the petitioner and the respondent agreed to the following arbitration clause:

> "All disputes and difference arising out of matters relating to the Agreement shall be decided by arbitration under the Indian Arbitration Act by reference to a single Arbitrator if the parties to these presents so agree upon and in default two arbitrators are to be nominated by either of the parties and to be appointed."

The applicant's Arbitrator Bimal Chatterjee was appointed on the 17th October, 1955 and the respondent's Arbitrator Kishanlal Mohta was appointed on the 21st October, 1955. Various statements and counter-statements were filed before the Arbitrators by the parties. The Arbitrators agreed on their award and published their joint award on or about the 17th or 19th March, 1956.

On behalf of the applicant the first objection taken to the award is that the Arbitrators went beyond the matters which were referred to them for decision. That objection is taken in paragraph 2 of the petition. Paragraph 2 of the petition refers to a letter of the 17th October, 1955 and makes the allegation that the parties did not make any reference to the Arbitrators to terminate the agreement between the parties and come to any final accounting. A reference to the letter of the 17th

(1) [1954] A.I.R. All. 673

October, 1955 written by the applicant to the respondent shows that *"all" disputes* between them were referred to arbitration in terms of the agreement. In fact, in the letter of the 17th October, 1955 the applicant writes: —

> "We cannot allow our interest to be jeopardised in this manner any further and we have decided *all disputes* between us should be referred to arbitration in terms of the said agreement. We have accordingly appointed Sri Bimal Chatterjee of 9/3A, Arpuli Lane, Calcutta as arbitrator" etc.

In fact, the last paragraph of that letter also ends with this statement: —

> "We reserve our right to put our other disputes and differences before the arbitrator or arbitrators."

Having said all that, it is now contended by the applicant that the award goes beyond the matters referred to the Arbitrators although *"all disputes"* between the parties were referred to Arbitrators according to the applicant himself. Obviously the disputes related to the agreement between the parties and the financial control mentioned there and the disputes certainly cover the disputes regarding accounts.

The gist of the award of the Arbitrators is (a) that the applicant was to pay to Saraogi a sum of Rs. 66,800/- in full payment of the claim of the said Saraogi against the Company with interest thereon at the rate of 6 per cent. per annum from the date of the award until payment, (b) the specified assets of the Company were charged for payment of the said amount.

Looking at the award it is clear to me that it did not travel at all beyond the matters referred to the Arbitrators. In fact, I find that the statements and counter-statements filed before the Arbitrators cover the exact point on which the award was made. In the statement of Kishori Lal Saraogi dated the 27th January, 1956 before the Arbitrators in paragraph 8(k) the respondent actually asked for an award for

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Rs. 66,200/- with interest and profits In fact, this is what was asked in the Respondent's statement:—

> "Award should be made directing the Company to make payment of the dues of the financier amounting to Rs. 67,200/- plus interest and profits in terms of the agreement."

That being so, it is clear to my mind that the award is not beyond the terms of the reference. In fact, I hold it is very much within the terms of reference constituted both by the letters appointing the Arbitrators as well as by the statements and counter-statements filed before them.

The second objection urged against the award is that the Arbitrators did not appoint an Umpire nor did they allow the applicant to nominate an Umpire in spite of repeated requests. This is put forward as a ground of misconduct. I have already quoted the arbitration agreement between the parties in this case. It does not expressly refer to the appointment of an Umpire. The argument is that under Clause 2 of the First Schedule of the Arbitration Act, 1940 it is provided:—

> "If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments."

It is, therefore, urged on the basis of this provision that the entire arbitration proceeding before the Arbitrators without the appointment of an umpire is illegal and invalid and the whole award is bad. I have no hesitation in rejecting this argument as unsound. There are many reasons for rejecting this argument. I shall state them briefly.

The first reason is that failure to appoint an Umpire under Clause 2 of the 1st Schedule of the Arbitration Act does not in my judgment render invalid either the arbitration or the award. It is at best a breach of a regulatory provision. My opinion is that the word "shall" in the above Clause 2 of the First Schedule of the Arbitration Act does not make the provi-

sion mandatory in the sense that its breach will vitiate the entire arbitration proceeding and make the award illegal. It is directory and not mandatory. All that it does is to make a directory provision whose breach does not necessarily vitiate the arbitration proceeding and whose breach certainly can be waived by the conduct of the parties.

The applicant relied on a decision of the Lucknow Bench of the Allahabad High Court in the case of *Jawala Prasad* v. *Amar Nath*,(1). It was a decision of a Division Bench consisting of Sapru and Chandiramani, JJ., and the judgment was delivered by Sapru, J. I regret my inability to subscribe to that decision in so far as it holds that the provisions of Clause 2 of the Schedule I of the Arbitration Act are of a mandatory character and therefore the absence of appointment of an umpire in such an event makes the award invalid. With respect I consider the sounder view is the one exprssed by the Nagpur Division Bench of Hidayatullah and Kaushalendra Rao, JJ. in the case of *Tikaram Khupchand* -v- *Hansraj Hazarimal & anr.* (2). The Nagpur decision, although a later one, did not notice the Lucknow Bench decision of the Allahabad High Court. My reason for preferring the Nagpur decision to the Lucknow Bench decision is first because the former noticed the difference between mandatory and directory construction of the word "shall" which the latter did not and secondly because the Nagpur decision is based on well-known and persuasive precedents while the Lucknow Bench is not supported by authorities.

I shall however add one more reason of my own to those stated in the Nagpur decision in support of the view that appointment of Umpire in Clause 2 of the first schedule of Arbitration Act 1940 is directory and not mandatory. It is this S. 8(1)(C) of the Arbitration Act, 1940 expressly provides for the case where the parties are required to appoint an umpire and do not do so and such a provision would have been unnecessary if failure to appoint an umpire under clause 2 of the 1st Schedule of the Act irretrievably and incurably

(1) [1951] A.I.R. All. 474.
(2) [1951] A.I.R. Nag. 241.

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taints and vitiates the arbitration proceedings and the resulting Award.

An older decision of this High Court by Chitty J., not on Arbitration Act, 1940 but on the old arbitration law in *The Bombay Company Ltd.* v. *The National Jute Mills Co. Ltd.*(1) may be usefully quoted for explaining the underlying legal principle:—

> "The Court will, I take it, be adverse to setting aside, or pronouncing as illegal, the proceedings of a Tribunal selected by the parties themselves. It certainly should not do so on technical grounds. Here it is conceded that the arbitrators have agreed upon their award. There has therefore been no necessity for the intervention of an Umpire. If one had been nominated, the parties would be in the same position. No further reference could have been made by either side to obtain the Umpire's opinion, or to question the correctness of the arbitrators' award."

Here also in this case the Arbitrators have agreed and there was no occasion for any Umpire. It will be more than insensible technicality in such a case as this to hold that the award is bad because no Umpire was appointed who if appointed would have had no function as the Arbitrators agreed in this case.

Lastly, this argument also fails on the ground of waiver. Now Clause 2 of the First Schedule of the Arbitration Act makes it a duty of the Arbitrators to appoint an Umpire not later than one month from the latest date of their respective appointments. Now the latest date of appointment in this case was 21st October, 1955. One month expired on the 21st November, 1955. But thereafter on the 8th December, 1955, on the 17th January 1956, and on the 15th February, 1956 the applicant and the respondent appeared at different sittings before the Arbitrators without any protest. That conduct waives the defect of non-appointment of an Umpire. The applicant also had his remedy in his hands. He should have applied under Section 8(1)(c) of the Arbitration Act for the appoint-

(1) (1912) I.L.R. 39 Calc. 669.

merit of an Umpire and not quietly appeared before the Arbitrators who had not appointed the Umpire; and then when the Award goes against him he cannot be allowed to make a point that the award is made because no Umpire was appointed. Section 8(1)(c) of the Arbitration Act, 1940 is one of the express cases provided by the Statute, "where the parties or the arbitrators are required to appoint an Umpire and do not appoint him, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy." It also provides in Section 8(2) that if such appointment is not made within fifteen days after service of notice, the Court may, upon the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an umpire. Therefore, the applicant, in my opinion, has missed his chance twice, and I do not think he can now avail himself of this irregularity or defect of the non-appointment of an Umpire as a ground for setting aside the Award. Failure of the Arbitrators to appoint an Umpire under clause 2 of the 1st Schedule of the Arbitration Act being a breach curable by the procedure prescribed by Sec. 8 of the Act itself, a party who fails to follow tht procedure permitted by the Statute to remedy the breach and stands by till the award is made cannot put forward non-appointment of an Umpire as a ground for setting aside the Award.

In fact, the very decision of the Lucknow Bench of the Allahabad High Court on which reliance was placed by the applicant states that this is a condition which could be waived. In a later decision of the Allahabad High Court in the case *Sambhu Nath -v- Hari Shankar Lal & ors.* (1), a Division Bench consisting of Malik, C.J. and Sapru, J., came to the conclusion that "where the arbitrators fail to appoint an Umpire and the parties do not follow the procedure prescribed by S.8(1)(c) and S.8(2) but appear before the arbitrators and produce all their evidence, they must be deemed to have waived the irregularity and are estopped." That decision clearly says that the failure to appoint the Umpire is only an "irregularity". In so far as it does so, it whittles down the

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authority of the previous Lucknow Bench decision, which it considered although not expressly disavowed.

I therefore overrule this objection. .....

The next objection is that the award was out of time. If anything, it was out of time by a day. But as an application was made to extend the time and that application has been granted by this Court, no further objection can exist on this ground. I, therefore, overrule this objection as to time.

The next objection is that the applicant was not allowed inspection of the books of account and that the Arbitrators did not take into consideration the alleged false entries made by the respondent or that the Arbitrators did not allow the applicant to place its case properly. Now these are questions of fact. The different statements and counter-statements of the parties went into elaborate questions of account. It is, therefore, impossible for this Court to say that the Arbitrators did not give any proper hearing to the applicant. In fact, the objection really is that the books of account were seized and taken away by the Central Government, Detective Department, and as the Arbitrators could not have them, they really had no sufficient evidence to make the award. That objection is taken in paragraph 3(g) of the petition. But the fact there is that if that was so, the applicant could have applied for a subpoena for the production of those documents from the police under Section 43 of the Arbitration Act. But the applicant took no such steps to get such evidence before the Arbitrators. It is, therefore, not open to him to complain that such books as were seized by the police were the only evidence that could be produced before the Arbitrators. I, therefore, overrule these objections.

The last objection is that no meeting was held on the 16th March, 1956. The respondent's case on this point is that the Arbitrators fixed a meeting for the 14th March, 1956 by their letter of the 8th March, 1956, but the said meeting on the 14th March, 1956 could not be held on account of the inability of the applicant's own Arbitrator Bimal Chatterjee to attend and the respondent's further case is that the next

meeting was fixed for the 16th March in the house of Bimal Chatterjee and the parties were orally intimated accordingly and both the respondent and the Managing Director of the petitioner were present at the meeting of the 16th March, 1956 and the Arbitrators duly heard both parties. Now the applicant disputes it and says that there was no meeting on the 16th March, 1956. For that purpose he relies on a letter which is written by the applicant on the 17th March, 1956 to the Arbitrators. Now that letter of he 17th March, 1956 was not sent by a Peon Book or under any registered cover with acknowledgment due. I find that letter is not on the minutes and papers filed by the Arbitrators. Therefore, there is no evidence before me to show that that letter was actually received by the Arbitrators. Besides that I find that there is something more damaging to the applicant's case on this point. In fact, I find there are minutes of the meeting of the 16th March, 1956 which record the presence of S. C. Bhowmick, Managing Director of the applicant. The minute says that the meeting was held at the residence of Bimal Chatterjee, the Arbitrator who was the nominee of the applicant. These minutes are signed by the two Arbitrators. That being so, the *prima facie* evidence is entirely against the applicant's case that there was no meeting on the 16th March, 1956. It is also supported by the fact that although the papers were filed and the applicant had opportunity to inspect the records before he made this objection, not a word is said in his petition that the minute signed by his own nominee Arbitrator Bimal Chatterjee recordng his own presence at the meeting of the 16th March, 1956 is false and that his Arbitrator Chatterjee had signed a false statement by signing those minutes. If it was a fact, I have no doubt in my mind that the applicant would have made that his very first ground of challenging the award. Not a word, however, appears in the petition on that point that Bimal Chatterjee's signature to the minutes of the 16th March, 1956 records a false statement by recording the presence of the applicant himself.

The general allegation is made on the basis of these facts that the Arbitrators were biassed. I find no bias at all. There are, in fact, no other particulars of alleged bias except those which I have discussed above.

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All the objections, therefore, fail. I dismiss this application with costs. Judgment upon Award will follow with interest and costs.

A. C. Bose, Solicitor for the Applicant.

Mr. B. M. Bajbaria, Solicitor for the Respondent.

Application dismissed.

R.N.C.

ORIGINAL CIVIL.

Before Mr. Justice G. K. Mitter.

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PULIN CHANDRA DAW & ORS.*

Suit by the Corporation of Calcutta to recover annual sums from owners of premises for exemption of a portion from acquisition—The Calcutta Municipal Act (Ben. Act III of 1899) Sec. 357 (1) (2) (3)—Repeal of the Act by Bengal Act III of 1923—Section 2 (1) (3)—Effect—The Amendment Act of 1926 (Ben. Act V of 1926)—Section 557A—Bengal General Clauses Act (Ben. Act I of 1889)—Section 8—Effect.

Sub-section (3) of Section 2 of the Calcutta Municipal Act 1923 does not indicate any intention on the part of the Legislature to do away with the vested rights acquired under the Act of 1899. The said sub-section merely shows that certain things enumerated therein which had been done under the Act of 1899 were to be considered as having been done under the new Act.

The right of the Corporation under Section 357 of the Act of 1899 to recover the annual sums or the lump sum fee in case the party elected to pay the lump sum fee in preference to the annual sums, accrued as soon as the party made his choice or elected to pay in either of the said two ways. The right had accrued as soon as the election was made. Its enforcement only was deferred.

So also, the proviso to sub-section (2) of Section 357 of the Act of 1899 provides that as soon as the owner of the land declares his intention to retain it by paying to the Corporation an annual sum to be fixed by the General Committee in that behalf or a lump sum to be fixed by the General Committee, he 'acquires' a right to hold the land, subject to the payment of the said fees, and it would not be open to the Corporation of Calcutta after the repeal of the Act of 1899 to contend that the owner had lost his right to retain the land. As soon as the election is made the right comes into existence: only the payment in terms of the right acquired is postponed.

Section 8 of the Bengal General Clauses Act of 1899 is practically in the same terms as Section 38 of the English Interpretation Act of 1889 and therefore English judgment, based on the Act of 1899 would be clearly applicable to the present question under Section 8 of the Bengal General Clauses Act.

Hamilton Bell -v- *White*(1) referred to.

Suit by the Corporation of Calcutta to recover annual sums from the defendants.

The material facts will appear from the judgment.

B. Das for the Plaintiff.

* Original Side Suit No. 815 of 1952.

(1) (1922) 2 K.B. 422.

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Gouri Mitra for the defendants.

The judgment of the court was as follows:—

C. K. Mitter, J.:—In this suit the plaintiff seeks to recover from the defendants a sum of Rs. 21,333/- as annual sums due in respect of premises No. 12, Nayaratna Lane, Calcutta.

In the year 1920 the plaintiff decided to acquire premises No. 12, Nayaratna Lane, containing an area of over 2 Bighas, out of which a portion was required for roadway. On the application of the then owners of the said premises to retain the portion of the premises not required for the roadway the General Committee of the Corporation fixed under Section 357(2) of the Calcutta Municipal Act of 1899 an annual fee of Rs. 1825/- or in lieu thereof a lump sum fee of Rs. 45,724/- for exemption of the said portion of the premises from acquisition. This was on the 19th March, 1920. Subsequently the said annual fee was reduced to Rs. 1641/- and the lump sum fee to Rs. 41,025/-. The owners of the premises in persuance of the said arrangement regularly paid the said annual sum, till the year ending 23rd March, 1938 but failed and neglected to make any payment thereafter. Hence this suit.

The defence taken is that the lump sum fee of Rs. 45,724/- was payable at the option of the owners of the premises No. 12, Nayaratna Lane by equal instalments of Rs. 1825/- each and it was contended that the sums already paid at the rate of Rs. 1641/- annually ought to be deducted from and/Or adjusted towards the sum of Rs. 41,025/- already mentioned. The defendants further contend that the provision for the payment of Rs. 1641/- annually is penal, oppressive, illegal and unenforceable.

Before me the only contention urged on behalf of the defendants was that inasmuch as the Calcutta Municipal Act, 1899 under which the said annual sums of Rs. 1845/- and Rs. 1621/- had been fixed, was repealed by the Calcutta Municipal Act, 1923, the defendants are under no obligation from and after the repeal of the said later Act to pay the annual sums.

It, therefore, becomes necessary to state the relevant provisions of the Calcutta Municipal Act of 1899 and of the Act of 1923 and to consider the same along with the provisions of Section 8 of the Bengal General Clauses Act, 1899.

The relevant documents, which are to be found in Ex. A being an agreed brief of documents, contain several resolutions of the meeting of the Sub-committee appointed to consider applications for exemption under the proviso to Section 357(2) of the Calcutta Municipal Act, 1899. As regards 12, Nayaratna Lane, the premises in suit, the resolution reads as follows:—

> "The party appeared and agreed to purchase the narrow strip of surplus land at the north-west corner of the premises measuring about 2 chattacks at Rs. 2500/- per kottah.
>
> Resolved:—
>
> (1) That the exemption fee be fixed at an annual fee of Rs. 1825/- or a lump sum of Rs. 45,724/-.
>
> (2) That the applicant be allowed time till the 25th of March 1920 to accept the above terms, failing which the land will be acquired".

There seems to be a mistake in the copy of the said resolution regarding the area. The party paid the annual fee of Rs. 1825/- but disputed the accuracy of the area and it was, therefore, resolved that the correct area be determined by measurement in the presence of the party who was to be taken to pay the annual fee on the ascertained area at the rate already fixed by the Committee. This was confirmed by the proceedings held on the 31st March, 1921. It will, therefore, appear that at the suggestion of the party the land was measured and the annual fee was reduced from Rs. 1825/-. On the 28th November, 1946 the Chief Law Officer of the Corporation of Calcutta sent a notice to the defendants that they had failed to settle the amounts demanded on account of arrears of

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exemption fees in respect of Premises No. 12, Nayaratna Lane, and that if settlement was not made within seven days from date, proceedings would be adopted against the defendants. There are other demand letters in the said brief of correspondence to which no reference is necessary excepting that before the filing of the suit the Law Officer sent a final letter of demand dated the 16th January, 1952 whereby a sum of Rs. 21,333/- was claimed as being due from the 23rd March, 1939 to the 23rd March, 1951.

Section 357 of the Calcutta Municipal Act, 1899 provides as follows by its Sub-sections (1), (2) and (3) being the portions germane to the issue before me:—

"(1) The Chairman, with the approval of the Corporation, may acquire any land required for the purpose of opening, widening, extending or otherwise improving any public street, or of making any new public street and the buildings if any, standing upon such land.

(2) The Chairman, with the approval of the Corporation and the sanction of the Local Government, may acquire, in addition to land and buildings acquired under Sub-section (1) any land outside the proposed street alignment, with the buildings, if any, standing thereupon, which the Corporation may, in the exercise of any of the powers conferred by Sub-section (1), consider it expedient to acquire.

Provided that, in any case in which it is decided to acquire any land under this sub-section, the owner of such land may retain it by paying to the Corporation an annual sum to be fixed by the General Committee in that behalf; or a lump sum to be fixed by the General Committee, not being less than twenty-five times such annual sum.

(3) If any sum payable in pursuance of the proviso to sub-section (2) in respect of any land be not duly paid, the same shall be recoverable in the manner provided by this Act for the recovery of the consolidated rate; and

if not so recovered, the Chairman may enter upon the land and sell the same, with any erections standing thereon, by public auction, and may deduct the said sum and the expenses of the sale from the proceeds of the sale and shall pay the balance (if any) to the defaulter.

Section 228 of the said Act shows that the consolidated rate due in respect of any building or land was to be a first charge upon the said building or land subject to the prior payment of the land revenue if any, due to Government.

The Calcutta Municipal Act of 1899 was repealed by Act III of 1923 being the Calcutta Municipal Act of 1923. Section 2 sub-section (1) of the said Act provides as follows:— The following enactments are hereby repealed, namely: (a) the Calcutta Municipal Act, 1899, etc.

Sub-section (2) provides as follows:—

"(3) Every budget passed, loan taken, assessment or division made, standard plan of a Bustee approved, license, permission or sanction granted and debenture or notice issued under the Calcutta Municipal Act, 1899, shall, so far as it is in force at the commencement of, and is not inconsistent with, this Act, be deemed to have been respectively passed, taken, made, approved, granted or issued under this Act, and shall (unless previously altered, modified, cancelled, may be, under this Act remain in force for the period (if any) for which it was so passed, taken, made, approved, granted or issued."

As regards the enforcement of rights and obligations under the Calcutta Municipal Act of 1899, Section 557A of the Calcutta Municipal Act which was brought on the Statute book in the year 1926 provided as follows:—

"(1) A suit or legal proceeding instituted, or which might but for the passing of this Act have been instituted, by the General Committee or the Chairman under the Calcutta Municipal Act, 1899, may be continued or instituted by the Corporation as constituted under this Act.

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(2) For the purposes of such suit or legal proceeding and of all matters incidental thereto, the powers and duties of the General Committee and of the Chairman under the Calcutta Municipal Act, 1899, shall, from the commencement of this Act, be deemed to have vested in the Corporation and the Chief Executive Officer respectively; and when any action has been taken in accordance with the provisions of the Calcutta Municipal Act, 1899, such action shall be deemed to have been taken by the corresponding authority under this Act and the corresponding provisions of this Act shall be deemed to have been complied with.

(3) Save as provided in sub-section (2) the procedure prescribed by this Act shall be followed in all proceedings relating to a contravention of the provisions of the Calcutta Municipal Act, 1899.

(4) Notwithstanding anything contained in this Act or in any other law, a suit or legal proceeding under this section may be instituted at any time within one year from the commencement of the Calcutta Municipal (Amendment) Act, 1926.

Section 557B provided that :—

"Save as otherwise expressly provided in this Act, the powers and duties of the General Committee under the Calcutta Municipal Act, 1899, shall from the commencement of this Act, be deemed to have vested in the Corporation in respect of all matters whatsoever which have arisen under the provisions of the Calcutta Municipal Act, 1899".

The Bengal General Clauses Act (Act 1) of 1899 provided by Section 8 as follows:—

"Where this Act, or any Bengal Act made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(a) revive anything not in force or existing at the

time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any anactment so repealed.

The rest of the said section is not relevant for the purpose of this suit.

It was contended on behalf of the defendants that the effect of the repeal of the Act of 1899 was that it ceased to have any force after the date of its repeal and unless the right of the Corporation to recover the annual sums of Rs. 1641/- had accrued before the passing of the Act of 1923, the same would not be saved. It was further contended that sub-section (3) of Section 2 of the Calcutta Municipal Act, 1923 showed that except for the matters therein provided, the Act of 1899 would cease to have any binding force or effect, the contention being that the said sub-section showed that the repeal was to affect the rights, privileges, obligations or liability acquired, accrued, or incurred under the Act of 1899 excepting those specially provided for by sub-section (3) of Section 2 of the Act of 1923. I cannot accept this contention. In my view sub-section (3) of Section 2 of the Act of 1923 does not indicate any intention on the part of the Legislature to do away with the vested rights acquired under the Act of 1899. The said sub-section merely shows that certain things which had been done under the Act of 1899 were to be considered as having been done under the new Act so that there might be no necessity of passing a fresh budget, of making a fresh assessment, of re-drafting a plan of a projected public street or granting a fresh license, permission or sanction in every case.

The main contention of Mr. Mitter, learned counsel for the defendant, was that the right of the Corporation to recover

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the annual fees arose on the 23rd March of every year and that with the repeal of the Act of 1899 the right of the Corporation to recover the said annual sum lapsed. He amplified his argument by saying that the right of the Corporation to recover the annual fee in respect of the year ending 23rd March, 1939 could not be said by any stretch of imagination, to have accrued before the year 1923 and therefore, Section 8 of the Bengal General Clauses Act could not be called in aid by the Corporation of Calcutta. In my view this is not the correct way to look at the question. My own opinion is that the right of the Corporation to recover the annual sums or the lump sum fee in case the party elected to pay the lump sum fee in preference to the annual sums, accrued as soon as the party made his choice or elected to pay in either of the said two ways. It is true that the Corporation of Calcutta could not have started proceedings to recover the annual sums due for the year ending 23rd March, 1939 before that date: but that, in my opinion does not postpone the accrual of the right. The right had accrued as soon as the election of the owners of the premises No. 12, Nayaratna Lane was made. Its enforcement only was deferred.

Section 8 of the Bengal General Clauses Act of 1899 is practically in the same terms as section 38 of the English Interpretation Act of 1889 and therefore English judgment, based on the Act of 1899 would be clearly applicable to any similar question under Section 8 of the Bengal General Clauses Act which may come up for consideration. The judgment in the case of *Hamilton Bell* v. *White* (1) throws a considerable light on the question before me. In that case the defendant, a landlord of an agricultural holding, being desirous of selling it, gave his tenant notice to quit in September, 1920. By the Agricultural Holdings Act, 1908 when such a tenancy was determined by notice to quit in view of a sale of the holding, it could be treated as an unreasonable disturbance within the meaning of Section 11 of the Agricultural Holdings Act of 1908 and the tenant was entitled to compensation upon the terms and subject to the conditions of that section. One of the conditions of the tenants right to

(1) [1922] L.R. 2 K.B. 422.

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compensation under that section was that he should within two months after the receipt of the notice to quit give the landlord notice of his intention to claim compensation and another condition was to the effect that he should make his claim for compensation within three months after quitting the holding. The tenant gave notice of his intention to claim compensation within the time so limited but before the tenancy had expired and therefore before he could satisfy the second condition, Section 11 of the Act of 1908 was repealed. The tenant however made his claim within the three months limited by that section. It was contended before the County Court Judge to whom the case was referred by the arbitrators for opinion, that in view of the repeal the tenant had lost his right to compensation. The County Court Judge upheld such contention and the matter came up in appeal before the King's Bench Division and the learned Lord Justices, viz., Bankes, L.J., Scrutton, L.J. and Atkin, L.J. agreed in allowing the appeal. Bankes, L.J. held that the right of the tenant to compensation depended upon the act of the landlord,—namely, the giving of a notice to quit in view of a sale—in which event the section itself conferred a right to compensation subject to the tenant complying with the conditions therein specified, and so far as it was possible to do so down to the time when the section was repealed the tenant had in fact complied with them. Scrutton, L.J. held that "the conditions imposed by Section 11 were conditions, not of the acquisition of the right, but of its enforcement". Atkin, L.J. held: "Here the necessary event has happened, because the landlord has, in view of a sale of the property, given the tenant notice to quit. Under those circumstances the tenant has "acquired a right", which would "accrue" when he has quitted his holding, to receive compensation". In my view the proviso to sub-section (2) of Section 357 of the Act of 1899 provides that as soon as the owner of the land declares his intention to retain it by paying to the Corporation an annual sum to be fixed by the General Committee in that behalf or a lump sum to be fixed by the General Committee, he 'acquires' a right to hold the land, subject to the payment of the said fees, and it would not be open to the Corporation of Calcutta after the repeal of the Act of 1899 to contend that the owner had lost his right to

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retain the land. As soon as the election is made the right comes into existence: only the payment in terms of the right acquired is postponed. Similarly, in my opinion it would not be open to the owner of the land to contend after the repeal of the Act that he was absolved from paying any further annual sums or the balance of the lump sum, if any, still due from him.

Mr. Mitter faintly argued that it was not open to the Corporation of Calcutta to institute this suit as the proper body to take such proceedings was the Chairman referred to in the Act of 1899. Clearly this was a half-hearted argument and is not one of substance as Section 557A of the Act of 1923 clearly provides for such contingency.

It was agreed on behalf of the Corporation of Calcutta that the annual fees for two years ending on the 23rd March 1939 and 23rd March 1940 were barred by limitation and therefore, the claim of the Corporation will be reduced to Rs. 18,051/-.

The defence taken on behalf of the defendants failing, there will be a decree in favour of the plaintiff for Rs. 18,051/- and the said amount will be declared to be a first charge on the said premises No. 12, Nayaratna Lane, Calcutta. The decree will be in Form No. 5-A of Appendix D to the first Schedule to the Code of Civil Procedure under the provisions of Or. 34, Rule 4. The Corporation will also be entitled to the costs of this suit. Certified for two counsel.

S. K. Roy Chowdhury: Solicitor for the Plaintiff.
Kar Mehta & Co.: Solicitors for the Respondent.

R. N. C.

Suit decreed, but claim reduced.

CIVIL REVISION.

Before Mr. Justice S. C. Lahiri.

NIRANJAN PRODHAN

v.

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April, 10.

The West Bengal Bargadars Act (West Bengal Act II of 1950) Sections 7(3) and 15—Combined effect of Amendment of Section 7(3) by West Bengal Act 1 of 1953—Effect—Jurisdiction of Civil Court.

The combined effect of Section 7(3) as it stood before the Amendment Act of 1953 and Section 15 of the West Bengal Bargadars Act is that pecuniary compensation in lieu of the plaintiff's share of the barga produce could have been awarded by the Board even before the amendment to Section 7 by the Amendment Act 1 of 1953.

The only effect of the amendment is that by the amendment the Legislature wanted to make it obligatory on the Board to specify the money which is equivalent to the share of the barga produce pavable to the owner in every case.

Tht Civil Court would therefore have no jurisdiction to entertain a suit for recovery of the price of bhag paddy which could be decided only by the Bhag Chas Conciliation Board even before the amendment of Section 7(3).

Application for Revision under Section 25 of the Provincial Small Cause Courts Act by the transferee of the Plaintiff's decree.

The material facts will appear from the judgment.

Sambhu Nath Banerjee for the Petitioner.

Hiran Kumar Roy for the Opp. Party.

The judgment of the court was as follows:—

S. C. Lahiri, J.:—The only question which falls for determination in this Rule is whether before the amendment of Sub-section 3 of Section 7 of the West Bengal Bargadars Act by the Bargadar Amendment Act I of 1953, which came into operation on the 11th March, 1953, the Bhag Chas Conciliation Board constituted under the aforesaid Act had jurisdiction to make an award or order for payment of the price of owners share of the bhag produce.

The plaintiff instituted the suit out of which this Rule arises for the recovery of price of her share of barga produce on the 7th March, 1952. That suit terminated in a decree on the 10th November, 1952. On the 11th March, 1953, Sub-section 3 of Section 7 of the West Bengal Bargadars Act was amended by Act I of 1953 and by this amendment a proviso was added which runs as follows:

* Civil Revision Case No. 960 of 1955 against the order of I. B. Barman, Munsif, 1st Court, Midnapore, dated the 18th December, 1954.

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"Provided that where the dispute is in respect of the division or delivery of the produce, the Board shall specify the money which shall be payable under the award or the order, in default of the delivery of the share of the produce, as being the value of such share."

After obtaining the decree the plaintiff transferred it to the present petitioner Niranjan Prodhan who filed an application for execution. In the executing Court an objection was raised on behalf of the bargadar to the effect that the decree was without jurisdiction because the claim in the suit was for recovery of the price of bhag paddy which could be decided only by the Bhag Chas Conciliation Board which had been established in this local area on the 18th October, 1952 and as such under the terms of Section 9(2) of the West Bengal Bargadars Act, the Civil Court had no jurisdiction to entertain the suit. The executing Court allowed this objection and dismissed the execution case and against that order the petitioner who is a transferee of the decree has obtained the present Rule under Section 25 of the Provincial Small Causes Court Act.

There can be no question that if the suit which was instituted by the plaintiff came under one of the clauses enumerated in Section 7(1) of the Bargadars Act, the Civil Court had no jurisdiction. But Mr. Banerjee appearing for the petitioner has contended that prior to the amendment of 1953, the Bhag Chas Conciliation Board had jurisdiction to decide every dispute between the bargadar and owner with regard to "the division or delivery of the produce" in kind only. According to Mr. Banerjee under Section 7(1), as it stood before the amendment of 1953, the Bhag Chas Conciliation Board had no jurisdiction to determine a dispute relating to division or delivery of the produce in cash and this power was conferred on the Board for the first time by the West Bengal Bargadars Amendment Act of 1953, which I have already quoted above. Under Sub-section (3) of Section 7 the decision of the Board is required to be in the form of an award where the dispute is in respect of the division of the produce and in other cases in the form of an order. Reading the different provisions of Section 7 it seems that originally the power of the Board was confined to the division of delivery of the produce in kind only. But Mr. Roy appearing for the opposite

party has invited my attention to the provisions of Section 15 of the Act which is to the following effect:

"Any money payable under an award or order made under this Act shall be recoverable as an arrear of public demand."

Section 15, therefore, contemplates that money may be payable under an award or an order. The suit out of which the present Rule arises relates to a dispute regarding division and delivery of the plaintiff's share of the barga produce and instead of asking for a decree for payment in kind the plaintiff asked for payment of the price of the bhag produce. Mr. Roy accordingly argues that an award or order could have been made in respect of the plaintiff's claim if the present dispute had been decided by the Bhag Chas Conciliation Board and the amount of Rs. 153/- which had been decreed in favour of the plaintiff could have been included in the award or order that might have been passed by the Board. To my mind the combined effect of Section 7(3) as it stood before the Amendment Act of 1953 and Section 15 of the West Bengal Bargadars Act is that pecuniary compensation in lieu of the plaintiff's share of the barga produce could have been awarded by the Board even before the introduction of the amendment to Section 7 by the Amendment Act 1 of 1953. Clause (a) of Sub-section (1) of Section 7 read by itself lends support to the petitioner's contention that the power of the Board was confined to the division or delivery of the produce in kind only. But read with Section 15 it means that the Board had the power to make an award for the division and an order for the delivery of the produce either in cash or in kind.

The next point requires consideration is what was the object of the amendment which was introduced in Sub-section (3) of Section 7 by the Amendment Act of 1953. On behalf of the petitioner it has been contended that by this amendment the power was for the first time conferred upon the Bhag Chas Concilation Board to make an order for payment of the price of the produce in cash. But, as I have already said, Section 15 which was in the Act even before the amendment of 1953 conferred that power on the Board even before that day. The only effect of the amendment therefore seems to be this amendment the Legislature wanted to make it obli-

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gatory on the Board to specify the money which is equivalent to the share of the barga produce payable to the owner in every case. There might have been cases where the Bhag Chas Concilation Board made an award for division or an order for delivery of the produce in kind only and that might have led to considerable difficulties at the stage of execution and in order to remove those difficulties the legislature required the Board to specify in every case the money which shall be payable under the award or the order in default of delivery of the share of the produce in kind. I am not therefore, prepared to accept the argument of the petitioner that by this amendment the Board was for the first time empowered to make an order for delivery of the produce in cash.

Mr. Roy appearing for the opposite party has invited my attention to the case of *Krishna Chandra Ghosh* Vs. *Panchu Ghosh* (1), where Sen, J., held that the Civil Court has no jurisdiction to try the suit for recovery of bhag paddy which was pending on the date on which the West Bengal Bargadars Act came into force and the dispute must be referred to the Board. In this case the suit was for the recovery of a sum of Rs. 89/- as representing the value of bhag paddy and so it might have been contended in that case, as has been contended before me, that the Bhag Chas Conciliation Board had no jurisdiction to make an order for payment of money in lieu of the plaintiff's share of the bhag produce. But that point was not raised in that case and so I am not prepared to accept this decision as an authority on the point which has been raised before me in the present case. The second case which was relied upon by Mr. Roy appearing for the opposite party is that of *Md. Ismail Miah* Vs. *Tom Munda and others* (2), where Das Gupta and Debarbrata Mookerjee, JJ., held that under the terms of Section 9(2) of the West Bengal Bargadars Act the Civil Court was precluded from entertaining any suit which came under any of the clauses of Sub-section (1) of Section 7, even where the land is situate in an area where no Bhag Chas Conciliation Board has been established by the Government. This decision was re-affirmed by Das Gupta and

(1) (1952) 57 C.W.N. 582.
(2) (1954) 59 C.W.N. 658.

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Guha, JJ., in the case of *Adhar Chandra Mandal* Vs. *Bistupada Gure* (1), where their Lordships dissented from certain decisions of single Judge of this Court to the effect that if there is no Board established in the area where the land is situate the jurisdiction of the Civil Court is not ousted by Section 9(2).

But these two Bench decisions do not affect the point which has been raised before me and they are of no assistance so far as the power of the Board to make an order for payment of money is concerned. In the case before me the Bhag Chas Conciliation Board was established in the area where the land is situate as will appear from the judgment of the learned Small Cause Court Judge which states that the "Calcutta Gazette", dated October 18, 1951, shows that the Bhag Chas Conciliation Board was appointed in Police Station Kotowali. In view of the interpretation which I have placed upon the different provisions of Section 7 and Section 15 of the West Bengal Bargadars Act, I think the point raised by the petitioner fails and this Rule stands discharged. But there will be no order as to costs.

Rule discharged.

R. N. C.

(1) (1955) 60 C.W.N. 351.

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PUBLIC DEMANDS RECOVERY ACT—By K. N. Bhaumik, B.L.
(Eastern Law House Ltd.)
Price Rs. 5/8/-

This is a useful book containing the Act, Rules thereunder and the statutory forms. Mr. Bhaumik has given copious comments on several Sections and Rules. The author has also referred to the latest decisions of all the Courts in India. He has dwelt on the vexed question of priority of debts in cases of competition between the Government and other creditors. The latest judgment of the Honourable the Chief Justice of the Calcutta High Court reported in 59 Calcutta Weekly Notes, 1119 has been referred to, to analyse the structure of the Act and to remove certain misconceptions about priority of the Revenue Authorities.

Mr. Bhaumik has also authoritatively dealt with several problems of certificate proceedings.

This book is reliable and will be of great value to all persons who will have occasion to deal with this Act which is now gaining importance. It can be said that the author has in his commentories given many useful suggestions with which one can lawfully resist many insistent demands of the revenue.

The printing is good and the price is reasonable.

H. N. G.

The Calcutta Law Journal

VOL. 97 { CALCUTTA } 2n.

REVIEW

BHARAT SHASAN TRANTRASAR.—(Constitution of India in Brief) by Hiralal Chakravortti, Publishers, Calcutta, Price Annas -/15/-.

The Constitution of India, 1949, is based on study of various Constitutions in the world and incorporates ideas and conceptions borrowed from other constitutions. The source, which first deserves mention, is the American Constitution which is generally regarded as a model of a Federal Constitution. On the subject of fundamental rights American decisions afford most valuable guidence for our courts. Secondly, in regard to writ proceedings, which are a Special and, next to fundamental rights, perhaps the most prominent feature of the Indian Constitution, English case law is invaluable. Our Constitution-makers have, in borrowing the terminology of English law to describe the writs, evidently intended that an courts should be guided by the principles of English law as far as possible. Thirdly, the Constitution is in many places an adaptation of the Government of India Act, 1935. The decisions on the Government of India Act are also therefore useful in interpreting and understanding the Constitution of India. The method of treatment to be adopted in a useful commentary an the Constitution of India must, therefore, be comparative. Bharat Sashan Tantra Sar, in which the above method seems to have been adopted, will, it is expected, prove very useful to persons who want to be enlightend an the Indian Constitution.

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REVIEWS

NEGOTIABLE INSTRUMENT ACT, by J. H. Khergramvala, Barrister-at-Law Published by N. M. Tripatee Limited.

The book of Mr. Khargamvalla need to introduction and its tenth edition has maintained the high standard of this handy and useful book. The legal profession businessmen and student of law and commerce will find this well-known Text Book on Negotiable Instrument Act, very useful.

The gook contains 212 pages at priced at Rs. 8/- by the publishers.

Indian law Quarterly Review—Editor Daulat Ram Prem, Senior Advocate, Arora Law House, Ajmeri Gate Extension, New Delhi—Annual subscription Rs. 9/-.

The journal is a newcomer in its field and has published its first volume, Part I, for the first quarter of 1956. The journal has a high and ambitious aim and object covering a very wide and useful field of legal journalism.

It has taken a very bold step by making frank and fair comments of cases decided by different courts of India and also different aspects of judicial system with special reference to India.

We wish every success to this journal which, we hope, will be very useful to the jurists, lawyers, police officers and other persons who are directly or indirectly connected with the administration of justice.

S.K.R.C.

HINDU MARRIAGE ACT 1955 by Jitendra Kumar Nag, Advocate, Calcutta High Court, published by (Mrs.) H. Nag of 58, Ballygunge Place, Calcutta-19, in January, 1956. Price Rs. 2-8-0.

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